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Supreme Court of the United States

OCTOBER TERM, 1962

No. 178

STATE TAX COMMISSION OF UTAH, PETITIONER,

vs.

PACIFIC STATES CAST IRON PIPE CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

PETITION FOR CERTIORARI FILED JUNE 13, 1962
CERTIORARI GRANTED OCTOBER 8, 1962

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings before the State Tax Commission of Utah		
Petition for formal hearing	1	1
Transcript of testimony	5	5
Appearances	5	5
Statement of Mr. Howard	6	6
Testimony of Paul M. Holt—		
direct	7	7
Statement by Mr. Gilmour	9	9
Testimony of E. J. Nelson—		
direct	30	24
cross	43	34
Glade Anderson—		
direct	51	41
Offers in evidence	52	42
Testimony of Glade Anderson—		
direct	55	45
cross	62	50
O. H. King—		
direct	66	53
cross	68	55
redirect	75	60
L. C. Carter—		
direct	76	61
cross	81	65

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 4, 1962

	Original	Print
Proceedings before the State Tax Commission of Utah—Continued		
Transcript of testimony—Continued		
Testimony of W. C. Clyde—		
direct	82	66
cross	86	69
redirect	89	71
Voir Dire Examination of Mr. Anderson	90	72
Decision	94	73
Findings of fact	94	74
Conclusions of law	96	77
Proceedings in the Supreme Court of the State of Utah	98	78
Petition for writ of certiorari to the State Tax Commission	98	78
Writ of certiorari	108	87
Opinion, Henriod, J.	110	88
Dissenting opinion, Crockett, J.	111a	93
Judgment	113	97
Petition for rehearing	114	98
Order denying petition for rehearing	116	98
Motion to recall remittitur	117	99
Order recalling remittitur	118	99
Designation of record to be certified (omitted in printing)	119	100
Clerk's certificate (omitted in printing)	121	100
Order allowing certiorari	122	100
Exhibits before the State Tax Commission of Utah		
No. 4—Covering pertinent documents relating to Platte Canyon Water & Sanitation District job, Littleton, Colorado		
(a)—Engineer's Plans and Specifications for construction of steel and cast iron pipelines on South Sheridan Boulevard and adjoining streets, No. 19-201, July 1959	123	101
(b)—Pacific States Cast Iron Pipe Co.'s Quotation No. D59-237, dated August 6, 1959 to all Contractors bidding on subject job	158	147

	Original	Print
Exhibits before the State Tax Commission of Utah —Continued		
No. 4—Covering pertinent documents relating to Platte Canyon Water & Sanitation District job, Littleton, Colorado—Continued		
(c)—Miscellaneous company papers and correspondence pertaining to subject job, including published advertisement for bid	161	150
(d)—Bill of lading covering consignment by Pacific States Cast Iron Pipe Co. to buyer, Warner Brothers as consignee, destination, Littleton, Colorado, dated December 7, 1959 with weight sheet	165	154
(e)—Invoice of Pacific States Cast Iron Pipe Co., dated December 7, 1959 covering sale of pipe to buyer, Warner Brothers Company	168	157
No. 5—Covering pertinent documents relating to Secondary Sewage Disposal Plant, Pueblo, Colorado		
(a)—Contract Documents for Secondary Sewage Disposal Plan, Pueblo, Colorado	170	159
(b)—Pacific States Cast Iron Pipe Co.'s Quotation No. D58-60, dated February 21, 1958 to all Contractors bidding on subject job	180	169
(c)—Miscellaneous company papers and correspondence pertaining to subject job	182	171
(d)—Bill of lading covering consignment by Pacific States Cast Iron Pipe Co. to buyer, Davis Const. Co. as consignee, destination, Pueblo, Colorado, dated April 30, 1958 with weight sheet	185	174
(e)—Invoice of Pacific States Cast Iron Pipe Co., dated April 30, 1958 covering sale of pipe to buyer, Davis Construction Co.	188	177
No. 6—Covering pertinent documents relating to Municipal Utilities Improvements—1959-T—Farmington, New Mexico		
(a)—Town of Farmington, New Mexico, Municipal Utilities Improvements—1959-T—Specifications and Contract Documents	190	179

	Original	Print
Exhibits before the State Tax Commission of Utah —Continued		
No. 6—Covering pertinent documents relating to Municipal Utilities Improvements—1959-T—Farmington, New Mexico—Continued		
(b) Pacific States Cast Iron Pipe Co.'s Quotation No. D59-232, dated July 31, 1959 to All Contractors bidding on subject job	206	195
(c) Miscellaneous company papers and correspondence pertaining to subject job	209	198
(d)—Bill of lading covering consignment by Pacific States Cast Iron Pipe Co. to buyer, San Juan Basin Const. Inc. as consignee, destination, Farmington, New Mexico, dated December 4, 1959 with weight sheet	212	201
(e) Invoice of Pacific States Cast Iron Pipe Co., dated December 4, 1959 covering sale of pipe to buyer, San Juan Basin Const. Inc.	215	204
No. 7—Covering pertinent documents relating to Access roads, streets and utilities for Page, Arizona. Glen Canyon Unit, Arizona—Utah Middle River Division, Colorado River Storage Project		
(a)—Schedule, Specifications, General Provisions—Bidding Schedule for specifications No. DC-4896	217	206
(b)—Pacific States Cast Iron Pipe Co.'s Quotation No. ___, dated May 23, 1957 to Contractors	247	243
(c)—Miscellaneous company papers and correspondence pertaining to subject job	254	250
(d)—Bill of lading covering consignment by Pacific States Cast Iron Pipe Co. to buyer W. W. Clyde Const. Co. as consignee, destination, Page, Arizona, dated March 1, 1958	263	259
(e)—Invoice of Pacific States Cast Iron Pipe Co., dated April 7, 1958 covering sale of pipe to buyer, W. W. Clyde Construction Company with weight sheet	266	262

[fol. 1]

BEFORE THE STATE TAX COMMISSION OF UTAH

PETITION FOR FORMAL HEARING—Received April 20, 1960

(Letterhead of Pacific States Cast Iron Pipe Co., Provo, Utah.)

April 20, 1960

State Tax Commission
State Capitol Building
Salt Lake City, Utah

Gentlemen:

Reference is made to your letter, dated April 12, 1960, designated 41187, signed by Mr. Paul M. Holt, Director, Auditing Division, to Pacific States Cast Iron Pipe Company, P. O. Box 18, Provo, Utah, determining and assessing sales and use tax liability against the company for the period January 1, 1957, to December 31, 1959, in a total amount including interest of $39,311.37. A breakdown of the aforesaid taxes is as follows:

	Additional Tax	*Interest*	*Total*
Sales Tax	$34,192.62	$2,964.43	$37,157.05
Use Tax	2,041.39	112.93	2,154.32
Totals	$36,234.01	$3,077.36	$39,311.37

Pacific States Cast Iron Pipe Company, the taxpayer, is a Nevada corporation duly qualified to transact business in the state of Utah. It is engaged primarily in the business of manufacturing cast iron pipe, fittings, valves, and hydrants. The foundry, plant, and offices are located in Provo, Utah. It sells pipe and pipe products not only to customers in the state of Utah but to customers in the other 12 western states including Alaska and Hawaii.

As shown in the aforesaid letter the assessment involves primarily transactions of sale in interstate commerce. The

sales in question were negotiated and effected by branch offices of the company located in other states. The contracts of sale not only contemplate but require an out-of-state shipment to an out-of-state customer and to a specific out-of-state destination. The company is contractually obligated to deliver the property to the spedific out-of-state point where the pipe and pipe products will be used by the customer at the job site. All sales are negotiated and [fol. 2] bid by the company on a delivered price basis with full freight allowed. The transactions, representing as they do interstate sales, are not subject to Utah State Sales Tax and any effort on the part of the Tax Commission to tax such sales is without support either under the United States Constitution, the pertinent Utah Statutes, or the regulations adopted thereunder.

The taxpayer feels aggrieved by the assessment made upon it by the Tax Commission as set forth in the aforesaid letter and hereby petitions in writing for a hearing and a correction of the amount of taxes and interest so assessed. As reasons, therefore, the taxpayer respectfully complains of and protests against the aforesaid assessment upon the following grounds to-wit:

1. The assessment is invalid, illegal, and unconstitutional by constituting a burden upon interstate commerce, all in violation and contravention of the provisions of Section 8 of Article I of the Constitution of the United States wherein it is provided that the Congress of the United States shall have power to regulate commerce among the several states.

2. The assessment is invalid, illegal and improper and in violation and contravention of the provisions of the taxing statutes prohibiting the State of Utah or the State Tax Commission from taxing any sales which the State of Utah is prohibited from taxing under the Constitution or laws of the United States or of the State of Utah, and more especially the provisions of Section 59-15-6, U. C. A. 1953, and Section 59-16-4(b). U. C. A. 1953.

3. The assessment is invalid, illegal and unconstitutional by being discriminatory and by denying to the taxpayer the equal protection of the laws, all in violation and contravention of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 24 of Article I of the Constitution of Utah.

4. The assessment is invalid, illegal and unconstitutional by depriving the taxpayer of property without due process of law, all in violation and contravention of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 7 of Article I of the Constitution of Utah.

[fol. 3] 5. The assessment is invalid and illegal in part by including sales of tangible personal property for resale and other than retail sales in violation of the provisions of Sections 59-15-2 and 59-15-4, U. C. A. 1953.

6. The assessment is invalid and illegal in part by including sales to the United States Government and to religious, charitable and eleemosynary institutions in violation of the provisions of Section 59-15-6, U. C. A. 1953.

7. The assessment is invalid and illegal in part by including property purchased for resale in this state and property which enters into and becomes an ingredient or component part of the property manufactured for sale by the taxpayer in violation of the provisions of sub-paragraphs (g) and (h) of Section 59-16-4, U. C. A. 1953.

8. The assessment is invalid, illegal and unconstitutional by taxing sales transacted and consummated in other states and outside the jurisdiction of the State of Utah, all in violation and contravention of the provisions of the sales tax law, Chapter 15, Title 59, U. C. A. 1953.

9. The assessment is invalid, illegal and unconstitutional in that the sales in question are either taxed twice or

subjected to the risk of double or multiple taxation by the State of Utah, the state of origin, and the states of destination of the products sold and in which the customers reside, all in violation and contravention of the equal protection and due process of law clauses of the Federal Constitution referred to in subparagraphs 1 and 3 above.

Upon the foregoing grounds, the taxpayer respectfully requests that the taxes, together with the interest thereon, determined and assessed as aforesaid be abated and set aside and that it be determined that there is no deficiency in taxes owing by or to be assessed against the taxpayer. It is also respectfully requested that the taxpayer be notified of the time and place of hearing in order that it may be given the opportunity of presenting the facts of the matter to and for the consideration of the Commission.

Yours very truly,

PACIFIC STATES CAST IRON PIPE COMPANY

(Signed) E. J. NELSON
General Manager

EJNgab
cc: Mr. O. H. King, Mr. O. H. King, Jr., Mr. C. M. Gilmour (2)

[fol. 5]

BEFORE THE STATE TAX COMMISSION OF UTAH

In the Matter of

PACIFIC STATES CAST IRON PIPE COMPANY

(Sales Tax Deficiency)

Room 106
State Capitol Building
Salt Lake City, Utah
January 4, 1961
10:00 O'Clock A.M.

Transcript of Testimony

APPEARANCES:

State Tax Commission of Utah: Orville Gunther, Chairman, Herbert F. Smart, Commissioner, Allan M. Lipman, Commissioner, Arias G. Belnap, Commissioner.

Representing the State Tax Commission: F. Burton Howard.

Representing the Taxpayer: C. Mathew Gilmour.

The above-entitled matter came on regularly for hearing at 10:00 o'clock A.M., January 4, 1961, before The State Tax Commission of Utah, at Room 106, State Capitol Building, and the following proceedings were had:

Commissioner Sharp: This is the time and place set for the hearing in the matter of the sales and use tax audit deficiency of the Pacific States Cast Iron Pipe Company. The record may show that the Pacific States Cast Iron Pipe Company is represented here by Mr. Mathew Gilmour—

Mr. Gilmour: C. M. Gilmour.

[fol. 6] Commissioner Sharp: C. M. Gilmour, attorney at law. The State Tax Commission is represented by Mr. Burton Howard, Assistant Attorney General. You may proceed, Mr. Howard.

STATEMENT OF MR. HOWARD

Mr. Howard: I would like to make a brief statement of the facts for the record and then I would like to call Mr. Holt to introduce the documents. The deficiency originally was a sales and use tax audit deficiency. It was proposed against the Pacific States Cast Iron Pipe Company for the period of 1956 to 1959. Since that time the use tax has been paid and a few items have been eliminated so that the deficiency now is based upon the failure of the taxpayer to collect and report sales tax on sales to lump sum and cost plus contractors of states other than Utah who took delivery of the pipe in Provo in their own trucks and transported the material themselves to points outside of the State of Utah.

Included also herein are similar transactions with the W. W. Clyde Construction Company, a Utah contractor, who took delivery of the material and transported it outside of the State of Utah and the taxpayer has contended in this case that the sales tax assessment violates the Commerce clause in the Federal Constitution and the Constitution of the State of Utah. Most of the—or all of the contracts provided that the price agreed upon would be the price delivered at the job site and that the contractor would pick up the pipe in their own trucks, receiving an allowance for the transportation charges.

If Mr. Gilmour wants to elaborate on the facts, why he is welcome to do that but that is our basic understanding of how our problem arose. I would like to call Mr. Holt please.

[fol. 7] PAUL M. HOLT, called as a witness on behalf of the Tax Commission, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Howard:

Q. Would you state your name?
A. Paul M. Holt.
Q. What is your position, Mr. Holt?
A. I am Chief Auditor of the State Tax Commission.
Q. How long have you been so employed?
A. In this present position, approximately four years.
Q. Were you in your present position during all periods of time which are mentioned or are involved in the hearing here today?
A. Yes.
Q. Did you supervise the work that was done in auditing the accounts and proposing the deficiencies which results in this hearing?
A. In a general supervisory way, yes.

Mr. Howard: Would you mark this?
Mr. Gilmour: Taxpayer's Exhibit No. 1.

(Marked for identification purposes, Taxpayer's Exhibit No. 1.)

By Mr. Howard:

Q. Mr. Holt, I hand you what has been marked as Taxpayer's Exhibit No. 1 for identification and ask you if you have ever seen the documents there before?
A. Yes.
Q. Would you state to the Commission what they propose to be?
A. This is a sales and use tax audit deficiency proposed against the Pacific States Cast Iron Pipe Company, Provo, [fol. 8] Utah, and the sales tax deficiency is for a period of three years, January 1, 1957, to December 31, 1959; and the use tax deficiency which is a period of January 1, 1956, to December 31, 1959.

Q. Is this the original or is it a copy of the documents?

A. This is a copy of the audit report that was mailed to the taxpayer under date of April the 12, 1960.

Mr. Howard: I would like to offer this into evidence at this time.

Mr. Gilmour: I have no objection.

Commissioner Sharp: It may be received in evidence. Let the record show that the exhibit entitled "Taxpayer's Exhibit No. 1" is identified as the Tax Commission Exhibit for the purposes of the record.

Mr. Gilmour: Very good.

Mr. Howard: I have nothing more at this time.

Mr. Gilmour: While Mr. Holt is on the stand, I might also, Mr. Howard, if agreeable, that we could by stipulation introduce and mark the taxpayer's letter of protest and letter requesting a hearing on the proposed deficiency dated April 20, 1960, and that be introduced as Taxpayer's Exhibit No. 2 and that be marked and introduced as Taxpayer's Exhibit No. 3, would be the letter dated May 30, 1960, to the Tax Commission signed by the taxpayer's attorney which enclosed a check for $4,173.49 covering the various items in the proposed assessment on which liability to tax was conceded and that leaving only in issue here the interstate sales that will be described in detail during the course of the hearing.

Mr. Howard: Does the Commission want to see these?

[fol. 9] Commissioner Sharp: Do you stipulate to them?

Mr. Howard: I have no objection to them.

Commissioner Sharp: They may be received in evidence.

(Marked for identification purposes, Taxpayer's Exhibits No. 2 and 3.)

Mr. Gilmour: I have no questions, Mr. Holt. With the Commission's permission, I would like to make a statement for the record.

Commissioner Sharp: Have you completed now?

Mr. Howard: The only thing is, I don't know whether we have got in the record the exact amount of tax that is due and owing now after the recomputation. Would you like to include that in your statement or shall I?

Mr. Gilmour: Well, it will be—

Commissioner Sharp: You mean the amount that is in dispute?

Mr. Gilmour: The amount in dispute will be the amount in Exhibit 1, less the tax which has been paid and which was forwarded by this Exhibit 3.

Commissioner Sharp: I think that covers it.

Mr. Howard: That is fine so long as we agree on it.

Mr. Gilmour: Is that all, Mr. Howard?

Mr. Howard: Yes.

STATEMENT BY MR. GILMOUR

Mr. Gilmour: This is a hearing with respect to a proposed deficiency in sales tax covering the period January 1, 1957, to December 31, 1959, sought to be imposed by the Commission against Pacific States Cast Iron Pipe Company. The deficiency letter, addressed to the taxpayer, [fol. 10] P. O. Box 18, Provo, Utah, and signed by Paul M. Holt, Director, Auditing Division, State Tax Commission, was dated April 12, 1960. This letter proposed to determine and assess against the taxpayer additional sales and use taxes as follows: Sales Tax, $34,192.62; interest, $2,964.43; Total, $37,157.05. Use Tax, $2,041.39; interest, $112.93; Total, $2,154.32; making total additional tax of $36,234.01; Total interest of $3,077.36, or a Grand Total of $39,311.37.

A statement attached to the deficieney letter states as follows:

"The proposed sales tax deficiency is due to the following causes:

1. Certain sales claimed to be interstate sales by the taxpayer are not sales in interstate commerce as defined by the sales tax regulations but were sales wherein the delivery was made in the state. Regulation 44 states:

'Sales made in interstate commerce are not subject to the sales tax imposed by the act. However, the mere fact that commodities purchased in Utah are transported beyond its boundaries is not enough to constitute the transaction of a sale in interstate commerce. Where the commodity is delivered to the buyer in this state even though the buyer

is not a resident of the state and intends to transport the property to a point outside the state, the sale is not in interstate commerce and is subject to the tax.'

2. Tangible personal property purchased for resale and [fol. 11] ultimately consumed by the taxpayer not reported.

3. Exemption certificates were not on file for certain sales claimed to be for resale.

The proposed use tax deficiency is due to the taxpayer's failure to report out-of-state purchases of tangible personal property for storage, use or consumption in the state."

Thereafter, and within the time allowed by law, the taxpayer on April 20, 1960, filed with the Commission a formal letter of protest against the proposed assessment of taxes by the Commission and requested a formal hearing thereon. The taxpayer's letter of protest enumerates nine specific grounds of protest and objection to the proposed assessment. More particularly we wish the record to be perfectly clear that the taxpayer claims the proposed assessment is invalid and illegal not merely under the Utah Sales Tax Act and Regulations of this Commission but is in direct violation and contravention of the Constitution of the United States in that the proposed assessment is an unconstitutional burden and interference with interstate commerce, is discriminatory and denies to the taxpayer the equal protection of the laws and deprives the taxpayer of property without due process of law. The specific sections and provisions of the Federal Constitution as aforesaid are referred to in taxpayer's letter of protest.

Following receipt of the said protest letter, the Commission scheduled an informal hearing on the matter which was held May 25, 1960. As a result of taxpayer's study of the proposed assessment it appeared that there were [fol. 12] certain sales and purchases on which tax should properly be imposed, not involving interstate commerce. Consequently, by letter dated May 30, 1960, and in accordance with the suggestion of Mr. Paul M. Holt to stop the running of interest on such conceded items, the taxpayer forwarded to the Commission its check in a total amount of $4,173.49 made up of tax in the amount of $3,925.38 and

interest in the amount of $248.11 computed to June 1, 1960. As a result of this payment the entire balance of the proposed assessment relates to and covers the validity and constitutionality of the sales tax sought to be imposed against the type and class of interstate shipments hereafter to be described.

One further informal hearing or conference was held on October 27, 1960, with the taxpayer reiterating again its contention that the proposed assessment is invalid and illegal and an unconstitutional burden on interstate commerce, among other things.

In order that the sole issue of the case be properly narrowed down and delineated for a proper understanding of the sworn facts to follow, it might be appropriate at this point to set forth the position of the Commission, as I understand it, and the position of the taxpayer on the interstate sales here in question.

The Commission recognizes and concedes that all of the sales here proposed to be taxed in fact involved a physical movement of property from the taxpayer's plant in Provo, Utah, across the state line to out-of-state destinations. The Commission also recognizes and concedes that the material was sold by the taxpayer for use on specific out-of-state jobs and was shipped in the specific sizes and the specific [fol. 13] lengths to conform with the governmental or other plans and specifications covering the particular out-of-state job.

The Commission also recognizes and concedes that when the particular out-of-state job was advertised generally by governmental authority for bids by prime contractors, that the taxpayer in turn made quotations for pipe and fittings to all such contractors bidding on the job on the basis of delivered prices, including freight at regularly established tariffs, to the particular out-of-state job site. The Commission recognizes and concedes that if the particular shipments here sought to be taxed had been transported to the out-of-state job locations by truck or rail common carrier or by taxpayer's own trucks there would be no tax payable to the State.

It appears to be the contention of the Commission, notwithstanding the transactions involved the actual and physi-

cal movement of property across the state line; notwithstanding such movement was an essential part of the sale; and notwithstanding the seller was obligated by the express or unavoidable implied terms of the sale to make physical delivery of the property which formed the subject matter of the transaction across the state boundary line to the buyer, the tax is nevertheless payable merely because the taxpayer hired and paid the buyer the established freight tariff, instead of a common carrier, to transport the material to the buyer at the specific out-of-state job location specified in the contract.

In other words, under exactly and precisely the same contractual arrangements, it is an interstate commerce transaction free of tax if the pipe is hauled at the tax-
[fol. 14] payer's expense by itself or by common carrier, truck or rail, but not if hauled at taxpayer's expense by the buyer for the seller in pursuance of seller's contractual obligation for a delivered price to deliver the pipe to the buyer at the out-of-state point of use. Surely such a grotesque and untenable position has no legal support whatsoever under the Constitution, the Utah Statutes, the Commission's Regulations or applicable judicial authorities.

The Commission seeks to distort and misapply the facts here and convert this case into what is sometimes referred to as an intention case.

Commissioner Sharp: Let me interrupt here a minute, Mat, how much more do you have of this statement—several pages. It appears to me that aren't you arguing the case before the Supreme Court rather than a statement? There are certain things in there that you say, for example, "... the Commission concedes ..." and so on which I do not necessarily want to, by failure to say we do not necessarily concur in your conclusion, and therefore we are not necessarily conceding that that is our position, but I am just wondering if your statement here is something other than a matter of evidence to be presented here this morning or a statement just necessarily of the facts that are to be involved—it is an argument for the Supreme Court or it could be an argument before us, but rather than in this particular hearing which is mostly for the purpose of getting evidence in the record.

Mr. Gilmour: It is a preliminary statement. It outlines what we understand to be your position. It outlines what is our position and it outlines the factors that are involved in the case and the type of evidence that will be intro-
[fol. 15] duced and I would appreciate—

Commissioner Sharp: I don't want to preclude you from making any statement that you desire for the record but I think that some of the terminology was argumentative. Your statement about "such a grotesque . . ." and such, certainly has no relevancy so far as the evidence here but I will certainly will not preclude you, so you go ahead.

Mr. Gilmour: Thank you very much Commissioner. The intention cases represent an old and unquestioned line of authority. They hold that a state may properly tax a transaction of sale by an out-of-state buyer where the transaction is fully consummated within the state by the complete and unrestricted passage of title and delivery of possession of the property within the state to the buyer, even though the buyer in his mind may subsequently intend to transport the property for use outside the state.

Such cases are clearly correct. Their rationale is simply this: The contract of sale does not involve for its performance the interstate shipment of subjects of commerce. The sales transaction is fully consummated locally. The buyer acquires full and complete title and full and complete right to possession of the goods locally. What the buyer may do with the property thereafter is of no concern to the seller. The contract of sale puts no obligation on the seller to deliver or to effect a delivery to an out-of-state destination. The seller is under no obligation to pay any freight for the interstate shipment. The transaction is strictly, in every respect, a local sale. The buyer's intention, if he so chooses, to subsequently then or at some later time, ship the goods out of state, does not make the sale
[fol. 16] interstate commerce. The state's power to tax this type of sale is clear under long standing applicable decisions. The rule of these intention cases is itself embodied in Regulation 44 by the statement as quoted in the Auditor's statement attached to the deficiency letter to the effect that sales of commodities delivered to the buyer in this state are not interstate commerce "even though the

buyer is not a resident of the state and intends to transport the property to a point outside the state.'

By no stretch of the imagination, let alone the facts, can the present case be twisted and tortured and converted into an intention case. No matter how zealous the personnel of the Commission to extract and drain and squeeze every last ounce of tax out of this taxpayer, the area here sought to be taxed cannot be taxed. It is a protected area, protected by constitutional safeguards giving the Congress power to regulate commerce among the several states.

We ask this Commission once again to look at the facts of this case objectively, free of prejudice, and to view them fairly and in an impartial manner. This we have a right to ask.

The present case is not an intention case. It is purely and simply a case of interstate commerce. The contract of sale for its performance required the interstate shipment of goods to a specific out-of-state job location.

The sales transaction is not consummated until the seller, taxpayer here, delivers the cast iron pipe under and in pursuance of the contract to the out-of-state job site. The very essence of the transaction, which we find this Commission's refusal to recognize absolutely incomprehensible, [fol. 17] is that this company bids on various large out-of-state construction jobs which involve the furnishing and the laying in the ground of cast iron pipe at the out-of-state job site in the specific sizes and lengths and types of fittings as are specified by the governmental or other plans and specifications covering the particular job. The contractual arrangements call for the delivery of the pipe at the job site. The taxpayer bids the jobs on the basis of delivered prices, including freight at established tariffs, to and at the job site. In all cases, the cost of freight is paid by the taxpayer.

In every respect the transactions comply with the rules for determining what constitutes interstate commerce free of tax under the provisions of Regulation 44 which read as follows:

"1. The transactions must involve actual and physical movement of the property sold across the state line." It does.

"2. Such movement must be an essential and not an incidental part of the sale." It is.

"3. The seller must be obligated by the express or unavoidable implied terms of the sale or contract to sell to make physical delivery of the property which forms the subject matter of the transaction across a state boundary line to the buyer." It is.

There are four different types of interstate sales effected by the taxpayer on these out-of-state governmental or other construction jobs which involve the furnishing and laying underground of cast iron pipe for waterworks, sewage or similar projects. The four types so far as the method of [fol. 18] bidding, pricing and the contractual documents are concerned are exactly the same. They differ only with respect to the method of delivery employed by the taxpayer in transporting the pipe to the out-of-state job site at the agreed delivered price. They are: First, taxpayer may use its own trucks to transport the pipe to the out-of-state job site; or, 2, it may employ truck common carrier; or, 3, it may employ rail common carrier; or, 4, it may employ the buyer to transport the pipe.

Mr. Howard: Excuse me a minute, I would like to have an objection to this, just for the record's sake if nothing else, but I think the contract should be the best evidence of all of this and there are many, many references as to what the contract says in this preliminary statement. I believe the contract really should be introduced.

Commissioner Sharp: Well, I think—

Mr. Howard: If these are intended as facts, I want to object to them.

Commissioner Sharp: This is a statement of counsel merely.

Mr. Gilmour: The Commission has not sought to tax Classes 1, 2 and 3 where delivery is effected by use of its own trucks or common carrier, trucks or rail. It seeks only to tax shipments where the taxpayer contracts with the buyer for the buyer to haul the pipe across the state line to the job site in pursuance of and in performance of seller's obligation to deliver the goods outside the state and in fact actually paying buyer the established tariff for performing this service.

The issue then of the case is whether a contract of sale [fol. 19] requiring an interstate delivery of goods by the seller is made any different whether taxpayer hires itself, or a railroad, or a truck common carrier or the buyer to effect the interstate delivery. Surely, it must be clear that the means of transport are unimportant so long as the interstate character of the transaction is plain. What possible basis in law can support the Commission's effort here to tax these sales? What possible legal theory can be responsibly advanced to support an unconstitutional tax?

From our conferences and informal hearings to date the position of the auditing personnel in proposing this tax is to us very confused and quite unintelligible. It appears to be that if title passes f.o.b. seller's foundry in Provo, the sale is a local sale and taxable. Such a position is unsound, in fact ridiculous, because long ago it was decided and has been repeatedly reaffirmed that the interstate character of a sale is in no wise affected in the slightest by whether title is technically to pass f.o.b. point of origin or f.o.b. point of destination. The point of inquiry is rather whether the contract of sale calls by its terms for the interstate shipment and delivery of the goods outside the state. The f.o.b. point and the means of transport are irrelevant.

Any suggestion in this record that the buyer, because he is employed rather than a common carrier or seller's own trucks, to perform the interstate haul, could breach his contract of haulage and divert the pipe to local use and that for this reason the sales are taxable is preposterous, absurd and unavailing to the Commission as a proper basis on which to support the tax. The Utah sales tax law does [fol. 20] not impose a tax on breaches of contract. The evidence will show that there were no breaches of contract. All of the material moved according to contract in discharge of seller's obligation to deliver the goods out of state. In all cases the buyers were paid the established tariff rate for the interstate haul performed for the seller. In all cases, seller only agreed to permit the buyer to haul to the out-of-state job site where seller was fully satisfied buyer had adequate insurance and truck facilities to perform the interstate haul.

The possibility of diversion to local use, contrary to the contract, as a basis of tax is made even more absurd when considered in the light of taxpayer's method of doing business and pricing system. The evidence will show this industry to be fiercely competitive and to operate strictly and entirely on a delivered price basis. To date the Commission has completely failed to recognize, understand and accept what is here the fact, namely, each sale is quoted and contracts of sale entered into with the customer on the basis of a price at a specified point of delivery and use. The taxpayer maintains no f.o.b. plant price on any of its products. It has no catalogue of prices of products at the foundry. This may seem somewhat strange to this Commission but it is nevertheless the fact.

No customer can drive up to this plant in a truck, say he wants to buy some pipe, put down the cash, get loaded up, and take off with the pipe for use wherever he sees fit. At a cement plant, steel plant, oil refinery or other types of manufacturing business, this can be done, but not in the cast iron pipe business. By reason of the unique [fol. 21] character of taxpayer's business, a ruling here in taxpayer's favor would not result in a revenue loss to the state as applied to other manfacturing industries.

Each order here is individually quoted on the basis of a price, including freight, delivered at the point of use where the pipe is put in the ground. This is the practice of long standing in the industry. There are several good reasons for it, some of them historical. Cast iron pipe is somewhat unique in various respects. It is heavy and expensive. Great care must be taken in its transport to prevent damage and breakage prior to its unloading alongside the trench site where it is to be buried. It has a specialized use, chiefly in waterworks and sewage systems. It goes chiefly into municipal or other governmental projects or large construction projects which are advertised for competitive bid under carefully prepared engineering plans and specifications. All prices are individually figured by the taxpayer at the point of use and delivery on the job in the light of what it can only estimate its competitor's prices will be quoted at the same point of delivery.

By following this system, the taxpayer carefully protects itself against possible claim of infraction of the Robinson-Patman Act and treble damages thereunder for selling to competing customers the same product at different prices. In other words, on each job as it comes up using cast iron pipe, taxpayer ascertains the names of all prime contractors bidding and competing for the job and furnishes to all such contractors a delivered price at the job site of the specific sizes and lengths of pipe and related fittings required under the plans and specifications for the [fol. 22] particular job.

Also, cast iron pipe in the tonnages required on the jobs here involved will run into very large sums of money. In practically every case, the contractor is unable to pay for the pipe except from proceeds realized from the job where the pipe is used. Long experience has demonstrated the necessity of strict control of all deliveries of pipe to a particular job and strict credit and collection measures to insure payment of pipe used on the job.

As a result, taxpayer's credit department follows each job and deliveries to the job site to be able to enforce its mechanics' lien rights or rights under the prime contractor's bond in those cases where the job is a bonded one. Lien foreclosure rights or remedies under such bonds for the benefit of material men would be seriously jeopardized if taxpayer followed some other system and did not contract on a delivered basis to sell pipe to the customer at the job site, whether inside or outside the state. Credit and collection problems also thus compel, as a matter of necessity, the entering into of a contract of sale for the furnishing and delivery by the taxpayer of pipe to a specific job and at the specific job site where the pipe will be buried in the ground.

Now a word about this matter of delivered prices with freight allowed. This is a familiar term in industry. There is nothing mysterious or sinister about it. It is perfectly simple.

Taxpayer here contracts to sell pipe and to deliver pipe to the buyer at the out-of-state job site for a delivered price. Included in this price are the various items of costs [fol. 23] of producing the pipe, a profit and the established

common carrier freight rate. Where seller employs a truck common carrier, for example, to effect the delivery seller will in most cases prepay the freight and invoice the agreed delivered price to the customer.

In some cases, however, the shipment may go freight collect and be paid by the customer for the seller. In such cases, seller reimburses the buyer for this freight by allowing such freight payment as a credit against the purchase price on the invoice.

Likewise in the cases, here involved, where seller employs buyer to transport the material to the job site, seller pays buyer the regular tariff freight rate by allowing such freight as a credit against the purchase price on the invoice. In all cases, therefore, freight is actually paid by seller. It is in the delivered price.

Any suggestion that an f.o.b. foundry price can be theoretically constructed by taking the delivered price quoted on a particular job, say at Littleton, Colorado, and subtracting therefrom the freight tariff would be completely false and incorrect. The company has no f.o.b. foundry price. Each price is individually determined at the point of delivery in the light of the competition taxpayer will face at that point.

In absolutely no case here involved, for example, could the buyer have possibly taken unrestricted possession and delivery of the pipe at Provo, stockpiling it there or diverting it to some local intrastate use, paying seller a net figure arrived at by deducting from the delivered price at Littleton, Colorado; Page, Arizona; Boise, Idaho; or wherever, [fol. 24] and the established tariff rate to such out-of-state location.

In the first place, this was not the contract. The contract of sale required seller to deliver and buyer to accept the goods out-of-state. Also, taxpayer would not, indeed could not, acquiesce in any such arrangement in view of its historical method of pricing and doing business and risks involved in permitting even the slightest departure therefrom. Ample remedies, by way of rescission or for damages, would have been available to taxpayer in such a situation if there had been such a case, which there was not. All contracts here involved were performed according to their terms.

Now a word about the f.o.b. point and where title passes in the sales of taxpayer's products. Let us emphasize once again that this question of where title passes is completely immaterial and irrelevant to the present inquiry. This is clearly the rule and is, indeed, even recognized in the Commission's Regulation 44 pertaining to out-of-state delivery effected by common carrier. It is stated:

"Where delivery is made by the seller to a common carrier for transportation to the buyer outside the State of Utah, the common carrier shall be deemed to be the agent of the vendor for the purposes of this section regardless of who is responsible for the payment of the freight charges."

This regulation in effect says that where a common carrier is employed to deliver out-of-state it is interstate commerce regardless of where title passes because where title technically passes is usually itself dependent on who [fol. 25] pays the freight. The regulation, it will be conceded, does not restrict interstate commerce to cases where title technically passes f.o.b. destination. If it goes by common carrier it is interstate commerce no matter what. F.o.b. origin or f.o.b. destination makes no difference.

It so happens here that in all cases taxpayer pays the freight charges whether taxpayer uses its own trucks, hires the buyer or hires a common carrier to effect the delivery out-of-state. Interstate commerce does not, however, whether in the case of common carrier transport or otherwise, turn on the question of who pays the freight. The question really is simply whether the contract of sale viewed in its entirety, requires for its performance the interstate delivery and transport of goods. Regardless of who pays the freight charges, regardless of where title passes, if the transaction involves a physical movement of property across the state line, if this movement is an essential part of the sale and if the seller is obligated to make a delivery across the state line to the buyer, you have interstate commerce protected by the Constitution and exempt from Utah Sales Tax.

Payment of freight charges to the out-of-state destination by the seller is, however, very significant in this re-

spect. It is strong and in fact almost conclusive evidence that seller is obligated by the terms of the contract to make a physical delivery of the property across the state line to the buyer. Nor is the force of such evidence in any way mitigated or reduced because seller may attempt by provision, in fine or even large print, to pass title for risk of loss or damage purposes f.o.b. point of origin.

Conferences to date have assumed, without discussing, [fol. 26] that certain printed provisions making the sale f.o.b. seller's foundry, Provo, even though seller pays the freight and is obligated in every case to make delivery to the buyer at a delivered price to the out-of-state destination, are effective in transferring title to the buyer at the foundry at the instant of commencement of the interstate journey.

I will not here concede, even though the point is completely immaterial, that the provisions pass title f.o.b. foundry to taxpayer's products. I will concede the existence of the provisions but not their legal effect. Research into this area shows this: The passage of title is an elusive and complicated thing because title passes when the parties intend it to pass. Taxpayer inserts these provisions into the documents in the hope that they are effective to pass on to the buyer the responsibility of collecting for any damages to the pipe which may occur during the interstate journey. Maybe they are effective to accomplish this result, I simply don't know.

We know that in many of these cases the buyers actually regard these sales as sales f.o.b. destination. They are buying pipe at a job site, not in Utah. They are interested in pipe delivered at a job site. Again, whether this fine print is effective to bind the buyers and pass title f.o.b. foundry is uncertain.

Against the fine print, is the general rule of the Uniform Sales Act embodied in our own statute that where seller pays the freight and makes the arrangements to have the material hauled to the buyer at destination, title passes f.o.b. destination. This rule is set forth in Section 60-2-3, Rule 5, Utah Code Annotated, 1953, as follows:

[fol. 27] "If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay

the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

If one thing is clear beyond doubt all of these sales are to a buyer at an out-of-state place agreed upon, with seller paying the cost of transportation. Hence title would pass to buyer at the agreed place of delivery. Also, Section 60-2-2, Subdivision 2, makes the legal effectiveness of this fine print doubly uncertain by providing:

"For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

In other words, a court in the present somewhat ambiguous situation is required to take into account not merely the terms of the fine print but also the conduct of the parties, usages of trade and the circumstances of each case. Research would disclose, I think, many cases where the courts have ruled title passed at a point other than that specified in the fine print under the particular facts and circumstances otherwise surrounding the transaction.

As previously indicated, however, this point of passage of title has nothing to do with the case. Interstate commerce is not determined by the f.o.b. point. The Commission is, of course, at liberty to pursue the point all it wishes but the cases make it abundantly clear that point is irrelevant to the [fol. 28] present inquiry. It is completely immaterial whether title passes at the beginning or in the middle, or at the end of the interstate journey.

Under applicable authority, our case is won if the evidence shows a contract to sell pipe involving, as an essential part of the sale, a physical movement across the state line and with the seller obligated under the contract to make delivery of the property across the state line to the buyer, regardless of who pays the freight or regardless of what particular means of transport seller employs to effect the delivery and regardless of where title passes.

If this case is not interstate commerce there is no such thing as interstate commerce. Indeed, conceding as it does

under the same contractual documents and arrangements that shipments by common carrier or by seller's own trucks are interstate commerce, really the only point involved here is whether the interstate character of the sale is lost solely by reason of the fact that seller hired the buyer, paying him the established tariff rate, in lieu of common carrier or use of its own trucks to make delivery at the job site across the state line to the buyer.

Surely this Commission cannot be so blind as to recognize that a limited right of possession to a buyer at the plant for the sole purpose of transport to an agreed out-of-state destination point and for a haulage fee is not an outright, unqualified and unrestricted delivery of full possession to the goods in Utah. The constitutional protection of interstate commerce is not and cannot be limited to common carrier transport.

So, in a very real sense, what this case boils down to in [fol. 29] essence is simply this: Can this Commisssion ignore the contracts altogether, treat them as if they did not exist, substitute between the parties out of the Auditing Division's imagination some completely different form or kind of agreement, and then justify such action on some vague idea that the agreements actually entered into were in some undefined way, fraudulent, evasive and a mere subterfuge to deprive Utah of sales tax. It should be remembered, I think, throughout this hearing that there is such a thing as interstate commerce; that it is protected by the Federal Constitution; that this Commission cannot destroy it.

Further, I think it should be borne in mind that this Commission must take the transactions as they are in fact and not as they would like them to be for them to be taxable. There is no authority in this Commission to tell taxpayer how to transact its business, what means of transport to select for its out-of-state deliveries or, by the same token to withhold the benefits of constitutional protection from any particular means of interstate transport selected by the taxpayer in performing its obligation to deliver the goods out-of-state.

Also, to remember is the fact that the bulk of all the sales here involved carry a sales or use tax on the same

transaction at the other end in the state of destination. In fact, most of these taxes are required to be collected and remitted by taxpayer to such states as an out-of-state vendor. In most instances, payment of these taxes is evidenced on the face of the invoice to the out-of-state buyers. It is discouraging that this point has been given absolutely no consideration whatsoever, by the Commission to date. It is [fol. 30] merely shrugged away on the basis that what the state on the other end of the transaction may do is of no concern to Utah in the slightest. Yet even the most cursory review of recent Supreme Court decisions shows that the risk of double or multiple taxation on the same transaction is terribly important as a consideration in condemning a sales tax by the state of origin where the same transaction could be taxed by the state of destination. No mere risk of another tax is here involved.

The bulk of the sales transactions here involved have actually, in fact, been taxed by the states of destinations. What the Commission is here attempting to do is unconstitutionally tax them again. By such action you discriminate against interstate commerce and subject it to two taxes, while requiring intrastate commerce to bear but one. This you cannot do.

Thank you very much for your consideration. As my first witness, Mr. Commissioner, I would like to call to the stand Mr. E. J. Nelson, General Manager of the company.

E. J. Nelson, called as a witness on behalf of the taxpayer, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Gilmour:

Q. Your name?
A. E. J. Nelson.
Q. Where do you reside?
A. Provo, Utah.
Q. Are you associated with the Pacific States Cast Iron Pipe Company, the taxpayer in this proceeding?
A. Yes, sir, I am.

[fol. 31] Q. What is your position with the company?

A. General Manager.

Q. How long have you been employed by the company?

A. Since January 4, 1927.

Q. Would you describe the different positions that you have held and occupied in the company?

A. I have been Cashier of the company, Auditor and Assistant Secretary and Assistant General Manager prior to my becoming General Manager of the company.

Q. When were you appointed General Manager?

A. I was appointed General Manager November 1, 1954.

Q. Would you describe the business of the company?

A. We manufacture and sell cast iron pressure pipe, pressure pipe fittings, gate valves and fire hydrants.

Q. Where is the plant of the company located?

A. It is located three miles south of Provo, Utah.

Q. Pacific States is incorporated under the laws of what state?

A. Under the state laws of Nevada.

Q. It is duly qualified to transact business in the State of Utah?

A. Yes, sir.

Q. In what areas and states does the company sell its products?

A. We sell our products in the thirteen western states including the State of Hawai'i and the State of Alaska.

Q. Would you describe in a general way the method and the contractual arrangements under which your company sells its products both inside and outside the State of Utah?

A. Inquiries for sale of material are received at our General Office at Provo, Utah, and through branch offices [fol. 32] located in Los Angeles, California; San Francisco, California; Portland, Oregon; Seattle, Washington. In addition to these sales offices, Waterworks Equipment Company, as our sales agent has sales agents located in Great Falls, Montana; Pocatello, Idaho; Boise, Idaho; Ogden, Richfield and Salt Lake City, Utah. Further, Dana E. Kepner Company of Denver, Colorado, is our sales agent for the States of Colorado, New Mexico and part of Wyoming.

Q. What happens, Mr. Nelson, upon receipt of these inquiries for the purchase of your products?

A. We figure the prices based on delivery to the location where the pipe is to be used with full freight allowed from Provo to destination.

Q. Could you say a word about your general price method as it is applied to all sales of material?

A. Prices are based on competition in these areas. We are competing with pipe manufactured in Birmingham, Alabama, Decoto, California, and Council Bluffs, Iowa, among others. All prices are figured individually by the company on the basis of delivered prices at the point of use and destination of the material.

Q. As you have indicated, all of these delivered prices are individually computed in the light and in the face of the competition which you must meet in these particular points?

A. That is correct.

Q. Generally speaking, what types and classes of customers are generally involved in the sales of the company's products?

A. We usually sell directly to governmental units or other agencies who have asked for bids or to contractors who are usually bidding on material used by government units or [fol. 33] other units.

Q. And how are these jobs originated?

A. The governmental units, of course, usually hire engineers who make a set of specifications specifying material to be used at a certain area and on a particular job. These jobs are then advertised for letting publicity in the newspaper at some specific date following the date of publication.

Q. What happens after such a publication requesting bids for that particular job?

A. Our salesmen follow each and every job with the governmental or other agency involved so that we do bid on the exact quantity and types of materials to all prospective purchasers. Most of the company's business involves jobs of governmental units. Of course, we also bid and sell to other companies and individuals such as subdividers but all sales are computed on the destination where the pipe is to be used.

Q. You have testified that following publication and advertisement for bids on particular governmental or other

jobs the company makes formal quotations to all such bidders?

A. That is correct.

Q. And all of such quotations are on the basis of delivered prices to the particular job site and for the particular project in that bid?

A. Yes, sir.

Q. How are deliveries effected by the company to the particular jobs?

A. They are delivered by rail, by common carrier truck or, in some cases, by the company's own trucks; or, in some instances, the company employs the customer himself to haul the material to the job site, and we pay him the regu-
[fol. 34] larly established common carrier rate.

Q. In the case of all sales of the company's products and especially those here involved, is the company obligated under its contractual arrangements to deliver the material to the job site?

Mr. Howard: I object to that question on the ground that the contract is the best evidence.

Commissioner Sharp: I think that objection is well taken.

Mr. Gilmour: Except to this extent, Mr. Commissioner, that the Court and this Commission is entitled to the evidence, to the testimony of persons, parties to the contract, to how they construe the contract.

Commissioner Sharp: You are asking for a conclusion there and this question was one I was going to propose later and might clear it up now. I think you might be getting into the same thing and that is the question, why in the bids is the bidding made f.o.b. Provo; that is point of origin, with freight allowed rather than f.o.b. point of destination?

Mr. Gilmour: Well, of course, we will cover that point, Mr. Commissioner, but I would—I can rephrase the question but what it really means is, does Pacific States as the seller, how does it construe its contract? Does it construe the contract as putting on the company the obligations to deliver, and it is well recognized that any testimony of a party to a contract as to what he understands the meaning of that contract to be, is pertinent evidence for the court to consider in interpreting the contract.

Commissioner Sharp: Well, if there is any ambiguity in the contract, yes, I think that is true.

[fol. 35] Mr. Gilmour: Well, apparently that is the sole—one of the sole—one of the chief issues here is whether or not there is an obligation on the part of the taxpayer here to deliver the goods out of state and so we are entitled to have these officials of the company testify as to their understanding and construction of the contractual arrangements in that respect.

Mr. Howard: I have to renew the objection, the contract hasn't been introduced. We don't have any idea whether there is anything that needs explaining or not and I have to stand on the objection. I don't believe that any evidence as to how he construes this is proper without the contract having been introduced.

Mr. Gilmour: In that respect, Mr. Commissioner, I could at this point introduce these documents but our plan is, if it is agreeable, is that Mr. Nelson here is testifying concerning the general operation of the business, more or less, and he will be followed by Mr. King, the Assistant General Manager, who will also touch in a general way and then with the Sales Manager, Mr. Anderson, will follow and these documents coming under his department's jurisdiction, it is our plan to have these introduced as exhibits by Mr. Anderson.

Commissioner Sharp: Well, let's let Mr. Nelson answer that question on the basis that it will be tied up with the specific contracts when introduced.

Mr. Gilmour: Yes, thank you.

A. The answer will be that all jobs are bid on the basis of any company selling and delivering the pipe products to the specified job site location, and delivery by the company to the job site is an essential part of the sale.

[fol. 36] Q. What are the reasons for the company pricing and selling its products in this manner?

A. To meet competitive conditions. I might state further that historically for many, many years and long prior to my own association in this pipe industry, all sales of cast iron pipe have been made and priced on the basis of the pipe company delivering the pipe at the point of use of the

material. This practice and policy has developed over the years and has been necessary, for example, for the reason that the nature of the pob is such that the customer is not interested in buying pipe at our foundry in Provo. He is only interested in pipe and the price of the pipe at the particular job site where the pipe is to be installed. In other words, putting the matter simply, we sell and price pipe at the job site because the customer wants it that way. The price is set on the basis of competitive conditions at the job site, and all quotations made by my company are on the basis of such prices delivered by the company at the job site because that is the only way the customer wants it.

Also of importance here is the financial problem of collecting the money for the pipe being sold. Most, and in fact, practically all of our customers pay for the pipe out of the proceeds of the job on which the pipe is used. Many of the jobs are what we call bonded jobs. That is, the governmental unit, for example, will require the successful contractor to furnish a bond which will protect all material men and labor on the job. Also, as you know, the mechanics' lien laws gives us certain rights where the material is sold and put by way of improvement into the ground. The use of a contract calling for the sale and delivery of specific [fol. 37] pipe at the job site enables this company to protect its rights under such bonds and mechanic lien laws in the event, as sometimes happens, the contractor gets into financial difficulties on the job.

Where it is necessary for us to file a claim against the bond or a mechanics' lien to protect our interests in securing payment for material furnished, it is necessary for us to furnish an exact legal description of the job or subdivision where the material is used. If the company followed some other selling method, for example, and sold pipe to the customer at the foundry without the contractual obligation to deliver to the particular job site, we would obviously and clearly have no remedies available to us collection wise either under the mechanics' lien laws or under the bonds furnished by the contractors on the job where the pipe would ultimately be used.

Q. Are there any other reasons which have led to the development of the delivered pricing system followed by the company?

A. Yes, there is. Under the Robinson-Patman Act, our company would run very grave risks of violating the law and making itself liable for treble damages under that law if it departed in any way from its delivered price system and, for example, sold to competing customers the same products at different prices.

Q. In your foregoing testimony, you indicated the pricing and selling method followed by the company is a matter of company policy?

A. Yes, sir, that is correct. In my position as General Manager it is a part of my duty and responsibility to see that all sales of products of my company are always and [fol. 38] invariably priced and sold on a delivered basis where the pipe is to be used, and I would emphasize here at the hearing that there is not and cannot be any question that under the contractual arrangements which we enter into with our customers that our company is definitely and clearly obligated to deliver the pipe to the customer at the job site.

Mr. Howard: I object to that and ask that it be stricken on the ground that the contract is the best evidence.

Mr. Gilmour: Again, Mr. Commissioner—

Commissioner Sharp: Well, I think under the rules that if that particular answer is tied up with a general practice, it is admissible in showing a course of business here. If it is limited only to this particular company, then it may not show—

Mr. Howard: He is testifying that there is no question under the contract that they're obligated to deliver and I don't believe that has been shown.

Mr. Gilmour: Under the general system of doing business and subject to pertinency when the contracts themselves will be introduced by Mr. Anderson, I think, Mr. Commissioner has already ruled on the admissibility of that.

Commissioner Sharp: The objection will be overruled.

By Mr. Gilmour:

Q. Mr. Nelson, you are familiar with the transactions that are involved in the proposed sales tax assessment involved here, are you not?

A. Yes, sir, I am familiar with the assessment and I would state that all of the transactions that are sought to be taxed here involve what our company regards as interstate [fol. 39] commerce. That is, all of the sales covered by the assessment reflect shipments across the state line to customers on out-of-state jobs. They involve sales of pipe in the specific quantities and in the specific sizes as required by the plans and specifications of the engineer covering the particular job. All of the sales actually crossed state lines and again I would state unequivocally under oath that my company is obligated to deliver the goods to the out-of-state location in performing its contract to sell such goods.

In other words, the delivery is an integral, necessary and obligatory part of the sales contract. As I have testified, in some cases we may use our own trucks. In some cases we may use rail common carrier. In some cases we may use truck common carrier and, finally, in some cases which are involved in the present assessment, we may employ the buyer to transport on our behalf the pipe to the out-of-state job location. But in doing this I would emphasize that my company has the responsibility for delivering the pipe or itself handling all arrangements for the delivery of the pipe and retains exclusive and sole control over such arrangements because, among other things, the reputation of our company is, in the long run, dependent on getting the pipe to the job site in satisfactory condition.

Also, I would point out that we do not and would not in most cases permit the buyer to haul the pipe which he is buying. We only permit this where we are reasonably satisfied that he has adequate transportation facilities to effect the delivery and adequate insurance covering the possibility of any damages or loss en route during the interstate haul to the out-of-state job location. Also, in the documents [fol. 40] which will be introduced into evidence, it will be noticed that in all instances where the buyer is employed by us and paid by us to effect the haul, he does—

Commissioner Sharp: I don't think that he is answering any question, he is just making statements here and I think we should limit this to question and answer. I think it is going a-field. If the Commission is bound by the strict rules of evidence in a court of law, I would approve in

favor of what our counsel's objections are on some of this and I think we are going a little too far when we are just reading statements and not answering questions that you propound.

By Mr. Gilmour:

Q. So far as you know, Mr. Nelson, are these transactions taxed in the states of destination?

A. Yes. As Mr. Carter will explain in more detail, these transactions, in most cases, carry a use tax paid to the state where the pipe is delivered.

Q. Mr. Nelson, there has been some suggestion heretofore by the members of the staff of this commission that where the company employs the customer to haul the pipe to the out-of-state job site, he could divert that pipe to local intrastate use, use it on other jobs or resell it. May I ask whether this is in fact the case?

A. My answer to that question is definitely no. It would not be possible, and let me amplify in some detail this answer. In the first place, it should be borne in mind as I have already testified that my company is obligated under the contracts of sale to deliver the pipe to the out-of-state specific job site and to the buyer at the job site. Whether we employ our own trucks or common carriers, [fol. 41] rail or truck, or the customer himself, the pipe by contractual obligation must go to the job site.

I might speculate that if a buyer attempted to divert pipe destined say to a Littleton, Colorado, job site, to any other point either in or out of the State of Utah, he would be breaching and violating the terms of the contract. I am myself not a lawyer, but our company is advised that we would have adequate legal remedies—

Commissioner Sharp: I don't think he is answering any questions. Let's have him answer without reading from a prepared statement. Let's get the facts in here now; that is what we are concerned about, facts on what you are to build the record, not statements of positions or argument with what the Commission may previously have indicated its position might be in an informal hearing. Let's get the facts into this record.

Mr. Gilmour: The question there I think was certainly pertinent because during the informal hearings, considerable discussion took place as a possible basis of validity of this tax; that this material could have been diverted to a local intrastate use.

Chairman Gunther: You are putting words in the Commission's mouth. You are suggesting how that this is what the Commission concluded in previous informal hearings. That might not be so.

Commissioner Sharp: I think that for the purpose of this, I want facts introduced here in evidence of what your case is on a factual basis. Argument can be made later.

By Mr. Gilmour:

Q. Let me ask you, Mr. Nelson, whether your company, [fol. 42] through its Sales Department and sales agents and also the Credit Department, is familiar with and follows up the matter of deliveries to particular jobs?

A. Yes, sir, they are.

Q. Why do you follow up these particular jobs, Mr. Nelson, to be sure that the material is delivered to the particular job?

A. Well, I follow these up as part of my job. As General Manager I am also over the Sales Department and the Accounting Department.

Q. Would you, in your own words, Mr. Nelson, describe the general position of the Pacific States Cast Iron Pipe Company in the industry as a whole in the United States, is it one of the large producers or what is the situation there?

A. The position of our company with the industry as a whole is very small. We have sales between ten and twelve million dollars a year of cast iron pressure pipe and fittings compared with hundreds of millions of the sales of pipe in the cast iron pipe industry.

Q. What is the name of the largest company in the industry?

A. The largest firm is United States Pipe and Foundry Company.

Q. It is what you term the giant of the industry?

A. That's right, yes.

Q. Does it have a plant located in the western part of the United States?

A. Yes, sir, they have a plant located at Decoto, California.

Q. And you are subjected to competition from that particular company and from that location?

A. Yes, sir, very much so.

Q. Is freight a significant and substantial portion of your [fol. 43] delivered prices that are generally quoted to customers?

A. Yes, sir, with freight being such an important consideration and the location of the project where it is being bid is very critical.

Mr. Gilmour: I believe that's all that we have, Mr. Howard, from Mr. Nelson.

Mr. Howard: I have a couple of questions.

Commissioner Sharp: Let's take a short recess at this time.

(Hearing recessed at 11:15 A.M. and reconvened at 11:20 A.M.)

Commissioner Sharp: You may proceed.

Cross examination.

By Mr. Howard:

Q. Mr. Nelson, I am going to ask you to suppose that you were selling cast iron pipe at a job site in Utah, say Logan or Cedar City or something like that?

A. Yes, sir.

Q. Would you consider the amount of the reportable sale to be the price f.o.b. at the factory or the price f.o.b. delivered in Logan; in other words, would you consider sales tax to apply to the price plus the freight or the price f.o.b. the factory?

A. Well, which would I consider the sales tax to be part—

Q. In other words, the figure at the factory or the foundry would be less than the price plus the freight delivered to Logan. Which amount would you consider the sales tax

to apply to or which would you report to the Tax Commission?

A. Well, I believe to that, Mr. Carter could answer that better than I because he handles all of these sales taxes. [fol. 44] I am in overall charge—

Q. Is your answer you don't know?

A. Beg pardon?

Commissioner Sharp: Is your answer you don't know?

The Witness: I don't know.

By Mr. Howard:

Q. What type of employment contract is entered into—let me start over.

Is it your understanding, Mr. Nelson, that all of the transactions that are involved in this hearing are represented by instances where the purchaser takes delivery in his own truck at your site?

A. Yes, sir.

Q. Well, in these types of transactions, what type of an employment contract is signed with the purchaser; when you hand the pipe over to him and let him put it in his trucks, do you make him sign any type of a contract?

A. He signs—he would have signed a contract before or we would have entered into a contract I would say with him for certain prices that we would charge him for this pipe delivered at the job site.

Q. You stated in your testimony that he was obliged to deliver the pipe out of state and I wonder what type of a contractual obligation he has to deliver the pipe out of state?

A. Well, in bidding on a job, we bid on the job delivered at this particular job site and when he uses his own equipment for this delivery, we of course pay him or allow him for whatever the current rate would be, traffic rate, for the material delivered to the job site.

Q. In other words, he doesn't sign any type of employ-[fol. 45] ment contract whereby he becomes your agent to deliver the pipe out of state?

A. I don't know what you mean by employment contract.

Q. Well, you stated that he was obliged—the trucker was apparently acting under your direction and was obliged to carry the pipe out of the state and I am trying to find out whether there is an independent contract entered into on this obligation or whether it is implied from the original contract of sale?

Mr. Gilmour: In other words, does he sign an invoice?

A. He signs all bills of lading.

By Mr. Howard:

Q. When he picks up the pipe at your plant, he signs a bill of lading, is that right?

A. Right, yes, sir.

Mr. Gilmour: Those bills of lading will be introduced in evidence, Mr. Howard, through Mr. Anderson as I have heretofore indicated.

By Mr. Howard:

Q. Let me expound on that just a minute. This bill of lading or this additional item that he signs is then signed at the plant, is that right?

A. Yes, sir.

Mr. Howard: I don't think I have anything else.

Mr. Sharp: Just a moment.

Chairman Gunther: I would like to ask a question.

By Chairman Gunther:

Q. Mr. Nelson, exploring this just a little further, you indicated earlier in your testimony that on occasion you hire the purchaser to act as your agent to transport [fol. 46] goods to the job site?

A. Yes, sir.

Q. Now is it our understanding that at the moment you have him sign this bill of lading; that in effect is a contract to him then to act as your agent, you have hired him at that moment?

A. Yes, sir, to deliver the pipe to this job site.

Q. Well now, you stated earlier at some length that the customer requests a quotation f.o.b. job site and that is the reason that you conduct the business this way and he is not interested in any other quotation, you stated, but only f.o.b. job site. Now in lieu of that fact, why do you enter into a contract, pricing the goods f.o.b. Provo, Utah, freight allowed to job site?

A. Well, that would indicate there that the price is a delivered price at the job site. This is where the competition is and if there are other bidders, which there are in big jobs, all contractors want to know what the price is delivered at the job.

Q. Well, but my question is, then why do you not quote it f.o.b. the job site rather than f.o.b. Provo, Utah, freight allowed to the job site?

A. Well, what is the difference? We are paying the freight in either way.

Q. Well, I am asking the question, why do you do it that way, why you don't quote it f.o.b. the job site rather than f.o.b. Provo, Utah, freight allowed to job site, if the customer wants a quotation f.o.b. job site?

A. Well, there are some instances where it might be better to quote the price freight allowed rather than freight [fol. 47] prepaid. I would say that in most all cases it is prepaid.

Q. But you haven't yet answered my question. You spoke at some length of the importance to the customer of receiving a quotation f.o.b. job site. Now my question is, why then don't you quote it f.o.b. job site? Why do you quote f.o.b. Provo, Utah, freight allowed to job site?

A. Well, theoretically f.o.b. Provo, with freight allowed, is the same as f.o.b. job site.

Q. Well, my question is then, why do you do it that way, is it because you are suggesting there is no distinction between an f.o.b. Provo, Utah, freight allowed, compared to an f.o.b. destination quotation?

A. Well, there may be some instances of course where it might be better for the consignor, let's say the city of Portland, for instance, to pay this freight rather than our paying it in which case we will allow them the freight.

They may want to have them come that way, they pay themselves, rather than our paying it.

Q. Well, my question now would be, is there a difference between a quotation f.o.b. Provo, Utah, freight allowed to job site, and a quotation f.o.b. job site?

A. No, sir.

Q. Pardon?

A. No, sir.

Q. In the event of damage to or loss to the merchandise during transportation, is there a difference between the quotation f.o.b. Provo, Utah, freight allowed, and f.o.b. job site?

A. I wouldn't think there would be because we are still obligated to deliver it to them.

[fol. 48] Q. In the event of an insurance claim, would there be a difference?

A. You mean a claim for damage of pipe en route?

Q. Yes.

A. In that event, sometimes we do like to say, well, it would be f.o.b. the foundry, but yet on the other hand we do know that we are obligated to deliver the pipe to the job site.

Q. But you haven't answered my question?

A. But we do assist our customers many times in filing claims against the carrier. We do have a Traffic Department here in Salt Lake City who are familiar with that kind of work and we will voluntarily in most instances file the claim for them.

Q. But in the event of an f.o.b. Provo, Utah, freight allowed, job site sale, would your obligation in the filing for an insurance claim be different from one in which the sale were f.o.b job site?

A. Will you say that again please?

(Last question read by reporter.)

A. I would say there would be no difference.

Q. In the event of an f.o.b. job site sale, who would be obligated to file and make the claim for the damage during transportation?

A. Well, as I said before, we usually work with the customer on that.

Q. Well, but who is obligated to—suppose the goods are lost on the way, you have quoted f.o.b. job site, the goods have been lost or damaged, who files the claim, who makes claim to the insurance carrier?

Mr. Gilmour: Could I just make a—

Chairman Gunther: He can answer that question.

[fol. 49] Commissioner Sharp: He can answer that question. He has asked him as the General Manager and he ought to be in a position to answer this question.

Mr. Gilmour: Well, I wasn't objecting.

A. Well, we usually file the claim ourselves.

By Chairman Gunther:

Q. You would file the claim?

A. Yes.

By Mr. Howard:

Q. The question is, who is obligated to file it, who is supposed to file it, not who usually files it?

A. Well, I would say that we file it.

Q. But who is supposed to file it or obligated under the law to—does your interpretation of that contract require you to file a claim of risk of loss?

A. I don't know what the law is. I don't know what the law is on that.

Q. Well, what is that interpretation as to who is required it?

A. We file the claims.

Q. But who is required to, do you consider that you are required to, "yes" or "no"?

A. I don't know.

Q. You don't know whether or not you are supposed to file it?

A. I know that we do file them.

Mr. Gilmour: I think, Mr.—

Commissioner Sharp: Now wait just a second, in the interest of continuity here, Mr. Gunther is questioning, let him continue on with his line until he is completed and then we will go on.

By Chairman Gunther:

Q. Now in the event of a similar loss under a sale made [fol. 50] f.o.b. Provo, freight allowed to job site, who is obligated to file the claim?

A. Well, I would say we are obligated to file it.

Q. Do you mean to say that when you sell f.o.b. Provo, Utah, freight allowed, that you are obligated and the customer has no obligations to file the claim, that your liability is exactly the same as in the former case?

A. I would say there would be no difference whether it is prepaid or freight allowed.

Mr. Gilmour: I would point out—off the record.

(Off the record discussion.)

Commissioner Sharp: Do you have any further questions?

Mr. Howard: I think that is all.

By Commissioner Beinap:

Q. You have stressed that it is important for the customer or the purchaser to know what the bid is at the point of destination; how does the customer determine what his price is going to be at the point of destination when you quote him just an f.o.b. Provo, freight allowed?

A. Well, in that instance we would tell him what the freight rate was.

Q. I just wonder why then in that case you don't quote it then f.o.b. destination so that he does know exactly what it is rather than have to go a round about way to determine what his price is going to be?

A. Well, he knows what it is because we tell him what the freight rate is in every instance.

Commissioner Sharp: Do you have any questions on re- [fol. 51] direct, Mr. Gilmour?

Mr. Gilmour: No.

Commissioner Sharp: I think that is all.

Mr. Gilmour: Call Mr. King.

Commissioner Sharp: Now off the record for just a moment.

(Off the record discussion.)

Mr. Gilmour: Instead of calling Mr. King at this point I will call Mr. L. G. Anderson.

GLADE ANDERSON, called as a witness on behalf of the taxpayer, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Gilmour:

Q. Your name is Glade Anderson and are you associated with the Pacific States Cast Iron Pipe Company?

A. Yes, I am.

Q. And what is your position?

A. Assistant Sales Manager.

Q. And how long have you been associated with the company and what positions have you held?

A. Well, I have been with the company since 1938, all of that time in the Sales Department; that includes approximately ten years in California, eight years as a sales representative and two years as District Manager of our Los Angeles office.

Mr. Gilmour: Mr. Howard, we have in these folders papers pertaining to four different typical and representative transactions. Taxpayer's Exhibit 4 covers pertinent documents relating to Platte Canyon Water and Sanitation District job, Littleton, Colorado, as follows: Exhibit [fol. 52] 4-A, Engineers' Plans and Specifications, No. 19-201, July, 1959.

Commissioner Sharp: Can't the witness identify those if they were handed to him and asked if he can identify them and know what they are?

By Mr. Gilmour:

Q. Would you, Mr. Anderson—

Commissioner Sharp: Is this a proposed exhibit?

By Mr. Gilmour:

Q. This is a proposed Exhibit No. 4 which will comprise Exhibit 4-A, B, C, D and E, and ask you, Mr. Anderson, to describe what those papers and documents are?

A. This is the specifications covering a job at Littleton, Colorado, which lists all materials required for that work and the related documents, including our quotation on the job.

Q. Excuse me, refer to it by the number, Mr. Anderson?

A. The specifications are numbered 4-A. Our quotations on this project which was sent to all contractors is No. 4-B. A telegram to our agent in Colorado regarding shipment is No. 4-C, along with related documents included under that number. A bill of lading which is typical of all those issued is listed under heading 4-D, along with the weight sheet made up at our plant showing individual weights of each pipe shipped; and an invoice, typical of all those issued on this and other projects, is numbered 4-E.

OFFERS IN EVIDENCE

Mr. Gilmour: I offer those in evidence as Taxpayer's Exhibits 4-A to E inclusive.

Commissioner Sharp: Now let me ask a question, are the sale of the products in your Exhibit 4 a matter of tax that is in dispute on this particular job?

Mr. Gilmour: Yes.

By Mr. Gilmour:

Q. I show you here what has been marked Exhibit 5, Mr. [fol. 53] Anderson, and would you describe what those documents consist of?

A. Exhibit 5-A is the contract documents which were prepared by responsible engineers covering a sewage disposal plant at Pueblo, Colorado. Exhibit 5-B is our quotation—a copy of our quotation, issued to all contractors bidding this particular project. Exhibit 5-C is correspondence in connection with the quoting of this particular job. Exhibit 5-D is a bill of lading covering one shipment made from the job along with a weight sheet. Exhibit 5-E is an invoice covering the materials shipped to this job.

Mr. Gilmour: And I offer Exhibit 5, consisting of documents marked Exhibit 5-A to E, inclusive, into evidence.

By Mr. Gilmour:

Q. I show you here, Mr. Anderson, what is marked Taxpayer's Exhibit 6 and ask you to describe what those documents consist of?

A. Exhibit 6-A covers specifications and contract documents prepared by an engineer for work to be done by the Town of Farmington, New Mexico. Exhibit 6-B is a copy of our quotation sent to contractors bidding this work. Exhibit 6-C is some correspondence in connection with this particular contract and it includes a list of the bidders who did receive a copy of our quotation. Exhibit 6-D is a bill of lading covering the shipment made under this contract and attached is the weight sheet. Exhibit 6-D is an invoice covering some materials shipped under this contract.

Mr. Gilmour: I offer in evidence Exhibit 6, comprising documents numbered 6-A to 6-E, inclusive, in evidence.

By Mr. Gilmour:

Q. I show you here, Mr. Anderson, what is marked as [fol. 54] Taxpayer's Exhibit No. 7 and ask you to describe what those documents consist of?

A. Exhibit 7-A is the contract covering work for the Bureau of Reclamation at Page, Arizona. Exhibit 7-B is a copy of our quotation which was sent to contractors bidding this work. Exhibit 7-C is a copy of various correspondence in connection with this contract. Exhibit 7-D is a bill of lading and a weight sheet covering materials shipped under this contract; and Exhibit 7-E is an invoice and an explanatory letter regarding an invoice covering materials delivered under this contract.

Mr. Gilmour: I offer Exhibit 7, comprising documents numbered Exhibit 7-A to E, inclusive, in evidence.

Commissioner Sharp: Now do you have any others you want to introduce as evidence?

Mr. Gilmour: No, Your Honor.

Mr. Howard: May I ask a couple of questions about them?

Commissioner Sharp: We were going to adjourn for the lunch hour and give you an opportunity to examine them and then do any voir dire you want to or any objections you may have after you have had an opportunity to examine them during the lunch hour.

Mr. Gilmour: Very good.

Commissioner Sharp: I presume now that until this is disposed of you don't want to go ahead beyond this, is that correct, Mr. Gilmour? In other words, until he gets a chance to do what he wants to do in connection with these documents that you have offered, you have nothing further to go ahead with this witness. I am just wondering whether [fol. 55] to adjourn for the lunch hour.

Mr. Gilmour: I think it being ten minutes of twelve that this might be a good time to adjourn or if the Commission wants to sit further I can proceed with the other testimony of this other witness. We have this to bring out —we have Mr. Anderson and Mr. King and Mr. Carter and we have also asked Mr. Clyde, one of the purchasers involved in this transaction, to appear and we suggested to him that 2:00 o'clock would probably—we probably wouldn't get to him until 2:00 so he plans to be here at 2:00.

Chairman Gunther: I have an engagement—speaking engagement that has been set up for a good many weeks in Utah County at 3:00 o'clock. Now I will have to leave here by at least 1:30 and I would like to sit during the remainder of the hearing so it would appear to make that possible, we would have to have a very short lunch period and then continue or we would have to continue it to another day.

Mr. Howard: We could defer my objections until later this afternoon if you would like to continue.

Commissioner Belnap: I too have a conference coming on at 2:30 and if possible to go right on or take a short lunch hour.

Mr. Gilmour: It is entirely up to the Commission's pleasure in the matter.

Commissioner Sharp: Well, let's go on until 12:30.

By Mr. Gilmour:

Q. Mr. Anderson, you have heard the testimony of Mr. Nelson here and according to your understanding, is that true and correct?

[fol. 56] A. Yes, sir, it is.

Q. Would you, in your own words, describe the sales arrangements and the method and pricing system that is followed by your company in effecting the sales and deliveries of the company's products to the company's customers?

A. Well, we follow each job through the salesman in the field from the time of its inception and this finally ends up in our quoting a delivered price to all contractors who take out plans and specifications for this work. This is carried through under the general policy as outlined by Mr. Nelson.

Q. How are these jobs originated in the field and to whom are these inquiries made?

A. Well, our type of material is used primarily, only by people who own a water system or own a sewer system. Now some of our sales are made directly to contractors who would be doing work for these particular units but there is a very limited number of people who would be purchasing this type of material.

Q. When the job is advertised or let for bid, what is the procedure followed by the company in making quotations to the contractors who may be interested in bidding on that particular job?

A. Our sales people would contact the engineer responsible for the plans and specifications and, if possible, secure a list of the contractors who had taken out copies. We would then also endeavor to secure such plans for ourselves. We would take a list, make a list of materials necessary and we would endeavor to quote all contractors who were bidding the work.

Q. And on what basis are the prices quoted by you to the [fol. 57] various contractors who are interested in that job?

A. Our prices are always quoted on a delivered basis. It is very essential to the company that we handle it in this way as the price does vary from one location to another. The only way we can figure prices is on a competitive basis and

we do this and we must know that the pipe is delivered to that location as a necessary part of our company function.

Q. Would you proceed further and outline for the benefit of the Commission the contractual arrangements that the company in fact utilizes in effecting a sale or sales of the company's products?

A. In a few cases we bid on forms that are prepared for that specific purpose but that is mainly to municipalities. On all contractors also we have our own quotation forms and we would submit a copy—

Q. Would you refer to one of those typical quotation forms and tell the Commission what is shown as a matter of practice on such forms?

A. Well, this is a typical form with our quotation issued on all contractors jobs. It—,

Mr. Howard: Excuse me, a minute, why don't you let him identify the exhibit and the sub-exhibit number out of this document?

A. This is Exhibit 7-B covering a quotation to Page, Arizona. This ordinarily shows the bid date, when bids are accepted. It identifies the project specifically and it lists all items and their prices covering the materials we would propose to purchase.

Q. And those lists of materials are tied into the engineer's plans and specifications on that job?

[fol. 58] A. They are tied in exactly for that job only.

Q. And the quotation shows the location of the job site?

A. Yes, sir, it does in every case.

Q. And your price quoted to those contractors is a delivered price to that job site?

A. Yes, sir, it is.

Q. In figuring the prices at which you quote to these particular job sites, how do you ascertain the freight rate which you include as an item in your price quotation?

A. Well, we have a list of many rail and truck rates in our office that would cover most requirements. Where we do not have the information available, it is secured from our Traffic Department which is located in Salt Lake.

Q. And after you have furnished your quotation to all contractors bidding on the job, then what happens next?

A. If at all possible we would have a sales representative attend the bid opening and either way we would immediately determine who the low bidder was and follow through and try to secure an order for materials.

Q. And where a particular contractor indicates that he will or would like to buy pipe from you, then what happens?

A. We would enter an order on our forms. We would send him a copy of a confirmation of this order so that there would be no question at all about how it was being handled. We of course then scheduled the material for production and make deliveries as required.

Q. And following the entering into of a contract and acceptance by the contractor of your quotation, then what happens under the procedure of your department?

A. Possibly I misunderstood the question. I thought I [fol. 59] had covered that in the last

Q. After the contractor has accepted your quotation, you then commence shipments immediately?

A. Well, we would handle it as is required by the contract. We would schedule it for production.

Q. And what methds of transportation does the company utilize in effecting the delivery to the job site of the products manufactured by the company?

A. Most of our materials are shipped by common carrier, either rail or truck, and we ship some on our own equipment and in some instances we would hire the buyer to haul the material.

Q. And is there any distinction in these contractual documents that you normally employ in your operations among these several classes?

A. No, sir, there isn't.

Q. And how are the shipments of material to the customer invoiced?

A. They are invoiced in accordance with the terms and conditions of the contract as entered on our purchase order.

Q. Are they invoiced by your department?

A. No, sir, they are handled through the Accounting Department from information furnished by the Sales Department.

Q. In effecting the delivery, are bills of lading employed in all classes of delivery?

A. Yes, sir, they are. We issue a uniform domestic straight bill of lading and this shows our own name as the shipper and it always lists the name of the party who is receiving the pipe and the final destination where it is going.

Q. And in all of the cases here involved, where the buyer [fol. 60] was utilized to effect the delivery to the out-of-state job site, were bills of lading in all cases used by the company and signed by the buyer?

A. Yes, sir, they were.

Q. Would you refer to one of the bills of lading that have been offered in evidence and describe what is shown thereon?

A. Exhibit 7-D covers a shipment made to W. W. Clyde Construction Company, Page, Arizona. This is shown on the bill of lading. It also lists the amount of material that was furnished and the bill of lading signed by an agent of Mr. Clyde.

Q. In the case of the sales and deliveries of the company's products, who pays the freight to destination?

A. We would be responsible for payment of freight.

Q. The freight is included as an item in your delivered price?

A. Yes, always.

Q. And how is this freight paid by the company, it is paid in cash or in what manner is the payment effected?

A. Well, it is paid either by direct payment to the carrier or it is paid as an allowance taken from the delivered price.

Q. Would it, Mr. Anderson, have been possible for any of the buyers involved in the sales which the Commission seeks to tax here, to have diverted the property to local intrastate use here in Utah?

A. Theoretically it may have been possible but if you consider any of the practical restraints, I do not believe that it is possible. Our product is sold to such a limited group and our coverage is so regular and so thorough and we are so well acquainted with the people, that I do not believe cast iron pipe could be offered for sale within the State of [fol. 61] Utah in any amount unless we would be made aware of it.

Q. Would you, in your testimony to the Commission, touch upon the collection problems which are involved as they affect the procedure followed in your department?

A. Well, naturally the credit must be approved and the information regarding credit is secured by the sales people in many instances. We would always secure information as to whether or not a job was bonded. If it is bonded, then we furnish the Accounting Department the name of the bonding company and the name and address of the local agent who would write the bond.

Q. And if the job is not bonded?

A. If the job is not bonded, then it becomes very important that we know the final and exact point of use so that we would have lien rights on the material.

Q. Have there been any instances during which you have been associated with the company in the Sales Department wherein the company has been required to enforce its rights under such bonds or under such mechanical lien laws?

A. Yes, sir, there have been quite a few.

Q. And in those instances, was there ever any difficulty in showing that the pipe was delivered to that particular job?

A. No, sir.

Q. Could you touch generally, Mr. Anderson, for the benefit of the Commission here, on the economic effects which would—as pertaining to the sales of the company's products that would be involved if this assessment is upheld?

A. This would be more serious than might be apparent. Cast iron pipe is purchased regularly in all areas that we serve and based on past experience and based on tabulations [fol. 62] of bids that we have, we can guess pretty closely to what our competitors will quote in any area. From my recollection, I would estimate that over ninety per cent of our sales are sold on jobs where the price spread between ourselves and our competitors is less than the two per cent sales tax. Now I think you can see the possibilities as on most of these jobs now under discussion—

Commissioner Sharp: Let's not—that is not testimony.

Mr. Gilmour: I believe that is fine, Mr. Anderson. I have no further questions, Mr. Howard.

Mr. Howard: Mr. Anderson, I would like to ask two questions.

Cross examination.

By Mr. Howard:

Q. Upon whom do you consider that the risk of loss falls when a purchaser takes delivery of pipe in his own truck at your foundry?

A. Well, the matter of where the title is—would pass on a quotation of destination prepaid or foundry freight allowed, has of course been debated. Now we quote foundry freight allowed with the hope that the title will pass at the foundry and that is if there is any problem arises on the goods, we would be in a better position. Also by quoting them that way it may make the purchaser more careful in handling the pipe and cast iron pipe is subject to handling damage.

Q. In other words, although oftentimes you assist a purchaser in filing a claim in case of loss, you would consider that it was his responsibility to file it, is that right?

A. Well, I don't know as to the term "responsibility." In [fol. 63] all cases, if we have any damage in transit, we offer to handle this for the buyer and in most cases we go ahead and allow a credit or replace the damaged material and we make the claim directly with the carrier. We have the facilities to do this through our Traffic Department in Salt Lake. Most of our customers do not, so the end result is that we do handle practically all claims.

Q. But by saying you offer to make the claim for the buyer, don't you imply that the buyer has the primary obligation of making the claim in the first place?

A. We may imply that.

Q. To your knowledge, Mr. Anderson, did any of the purchasers involved in transactions similar to these have a license from the Public Service Commission?

A. I do not know of any that were so licensed.

Q. Did you at any time ask any of these purchasers whether or not they were licensed?

A. No, sir, I haven't.

Mr. Howard: I would like to ask three questions that come to mind now about these exhibits with the option to possibly ask one or two later on when I study them over.

Commissioner Sharp: You mean would that be more convenient—

Mr. Howard: It doesn't matter, they are very short but if you want me to defer them until this afternoon, I have nothing more.

Commissioner Sharp: Whichever you would rather—if you would rather ask this of them now, go ahead.

Mr. Howard: We will wait; that will be all.

[fol. 64] Commissioner Sharp: I have one question, Mr. Anderson, in regard to your statement to the economic effect of the sales tax on this—

Mr. Howard: May I ask one more question please? Mr. Bednap reminded me—who was going to answer my question about whether or not a sale intrastate would include the freight or would include just the foundry price when it is reported to the Tax Commission. Was it Mr. Anderson that was going to answer that?

Mr. Gilmour: I believe Mr. Carter—that falls under his jurisdiction.

Commissioner Sharp: In what states, other than Utah, in which your company does business, is there a sales and use tax that has to be taken into consideration?

Mr. Gilmour: Mr. Carter, who has charge, is Chief—

Commissioner Sharp: If he doesn't know, he can so state.

A. Well, we are qualified to do business in Colorado and California and Washington and we collect the tax in those states. Now in some other states, they may require it but we do not collect the tax such as Arizona for example.

By Commissioner Sharp:

Q. Now then, if the transactions referred to in this case are in fact taxable in Utah, and you did not have to pay the use tax in the states to which the goods ultimately went, you would not have this economic effect to which you have referred to, would you?

A. Well, sir, we would be in the position of having to add Utah tax to the material in the amount of two per cent

and our competitors would not have to do this because [fol. 65] they are not located—

Q. But you are bidding to the same place and if there is a tax involved at this other place which is not exacted by you because it is a transaction taxable in Utah, then you would not be put in any unfavorable position in regard to your competitors, would you?

A. Well, sir, possibly I don't see the question but if we were doing business in Arizona, for example, and under the assumption that they do not have a tax and yet if we had to pay this tax on material where we hire the purchaser to deliver his own pipe, then we would have to collect that from the purchaser in the amount of two per cent while our competitors would be shipping from Iowa or California or Birmingham, Alabama, and they would not have to pay that particular tax. We would be at a two per cent disadvantage.

Q. Specifically, is there such a tax in Colorado?

A. Yes, sir.

Q. And the items which you ship to Colorado, I understand in here you have had an item for use tax or sales tax?

A. Yes, sir.

Q. Which you have paid in some instances or many instances, is that correct?

A. All instances.

Q. In all instances, so that if in fact these are taxable transactions in Utah and the Colorado law does not require you to pay the tax, if it is a taxable item in Utah, you would not have to pay the two percent in Colorado so you would be in exactly the same position as you are. The only place you would be put in the unfavorable position, is it not, is if both states exacted the tax?

[fol. 66] A. Well—

Q. Is that correct?

A. Well, no, sir. If we ship into a state that does not have a tax and we have to pay a tax, then we are in an unfavorable position in that state.

Q. Now which states are those?

A. I am not sure. I mean—

Q. But in states where they do exact the tax you would not be put in an unfavorable position if by paying it here you didn't have to pay it there?

A. Under the theoretical assumption

Q. Well, that is what I am proposing.

A. Theoretically we would not.

Commissioner Sharp: Yes, that is what I am saying. I have no more questions.

Mr. Gilmour: Call Mr. King to the stand.

O. H. KING, called as a witness on behalf of the taxpayer, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Gilmour:

Q. Your name?

A. O. H. King, Jr.

Q. And in what capacity are you associated with the taxpayer?

A. Assistant General Manager.

Q. And would you describe the different departments that you have been associated with in the company?

A. Industrial Engineering, Accounting, Sales, Engineering, Exploration and Development and now my present capacity.

Q. When were you appointed to your present position?

[fol. 67] A. In October, 1957.

Q. And you have heard the testimony here of Mr. Nelson and Mr. Anderson and according to your understanding, is it true and correct?

A. It is.

Q. Would you describe in your words the contractual arrangements that are utilized by the company in effecting the sale of the company's products to customers, both in and outside the state?

Commissioner Sharp: Mr. Gilmour, if this be cumulative testimony, can we not then stipulate that his testimony

would be the same with respect to that in the interests of time?

Mr. Gilmour: Yes, except that—that would be quite agreeable, Mr. Commissioner, but there are a few questions that I think that I would in addition like to ask him.

By Mr. Gilmour:

Q. In the cases here involved, Mr. King, where the buyer is utilized to effect the out-of-state delivery, does such a buyer acquire at the foundry an unrestricted right of possession to the material?

A. Not as far as we are concerned, he does not. He is acting to deliver the material to the specific job for which he and ourselves have entered into a sales and purchase contract.

Q. In your opinion, Mr. King, would it have been possible for any of the buyers to have diverted the pipe being sold to local use?

A. Perhaps possible but not practical. Mr. Anderson stated and I can also state that such—well, what I call conversion. I am not really a lawyer but what I call conversion [fol. 68] of our goods would not be possible because the purchaser himself does require that such an amount of pipe be furnished as is contracted for. We are therefore required to deliver this amount. If such pipe were diverted, he could claim that we owed him more pipe. We of course would say that we did not and then we would have a breach of contracts and I feel sure that we are not entering into any discussion as to whether we are taxing breaches of contracts in these particular instances that are under assessment.

Q. Were there any instances that are involved here of sales that were not shipped and delivered to the out-of-state job sites in accordance with the contracts?

A. All instances here under discussion were consummated as contracted.

Mr. Gilmour: That's all.

Mr. Howard: I have no further questions.

Commissioner Sharp: I have one question, Mr. King.

Cross examination,

By Commissioner Sharp:

Q. At the time—in taking one of these that is in controversy here, certain pipe was delivered to Mr. Clyde for transportation to Page, Arizona?

A. Yes, sir.

Q. And Mr. Clyde was one of the subcontractors on that job, is that correct?

A. Well, as to whether he was a subcontractor or a prime contractor for the Waterworks Utilities—

Q. Well, he was a contractor?

A. He was a contractor, yes, sir.

[fol. 69] Q. And the quotation which you made was made to Mr. Clyde?

A. Yes, sir, among others.

Q. And he accepted that?

A. Yes, sir.

Q. Now at the time that delivery was made to Mr. Clyde at the Provo plant and the goods were put into his truck and his truck left your yard?

A. Yes, sir.

Q. Whose property was Mr. Clyde transporting?

A. I would say a mutual property. I don't mean to hedge the question but as you have heard, we have reiterated this matter of delivery, yes, and this question of f.o.b. point has been discussed at great length.

Q. Are you saying that you are joint owners, you and Mr. Clyde?

A. Well, we still had an obligation and responsibility, a contractual force there.

Q. Well, what obligation?

A. For us.

Q. What obligation did you have, you have now delivered the pipe to Mr. Clyde who was the prime contractor?

A. Well, if the pipe had not gone to the job, if it had either been stolen, or convert—diverted by Mr. Clyde, we still would have been obligated to furnish the total amount of pipe.

Q. Well, who would you be obligated to?

A. Mr. Clyde.

Q. But you had already fulfilled that obligation?

A. Not insofar as the terms of the contract were concerned.

Q. Well, what were the terms of the contract?

[fol. 70] Q. The terms of the contract were that we quoted the prices f.o.b. foundry with freight allowed to Page, Arizona.

Q. All right, and—

A. That means that the prices were delivered—he received prices from several other bidders.

Q. So when you delivered to Mr. Clyde in his truck, this pipe which you had contracted to do and Mr. Clyde took it, wasn't your only obligation at that time to now allow him the freight, isn't that the only obligation that was left?

A. No, because if we had just allowed him the freight without making sure that the pipe had gotten to that destination, then we might have found ourselves in some other situations, such as violation of the Robinson-Patman.

Q. Or the chance of having his pipe converted?

A. Converted.

Q. Well now, let's take a hypothetical case here and let's assume—

A. Yes, sir.

Q. —that you delivered this pipe to Mr. Clyde and let's assume Mr. Clyde took this to Colorado—I am just assuming this you see—then what is your responsibility to Mr. Clyde; after all, he is the person you contracted with?

A. We contracted with him on our quotation form.

Q. Yes and you have fulfilled it, have you not, when you delivered the pipe to him?

A. No, because your quotation form provides for delivery to Page, Arizona.

Q. To Mr. Clyde?

A. To Mr. Clyde at Page, Arizona.

Q. No, no, that isn't what you said. You say in this, as I [fol. 71] recall, you say f.o.b. Provo, freight allowed to Page, Arizona?

A. Yes, sir, which means—

Q. So Mr. Clyde takes it and he says to you, "I am going to take this to Page, Arizona", and pulls out of the yard and

he heads south. So far as you know he is going to Page, Arizona.

A. Well, isn't it—

Q. Now isn't your obligation fulfilled under the contract to Mr. Clyde?

A. Our obligation insofar as an f.o.b. point may be fulfilled, but not our obligations as far as fulfilling the other requirements of purchase, of sale, which is also delivery.

Q. But you have made delivery?

A. No, sir, we haven't made delivery, not to the job site.

Q. Well—

A. That is what we bid.

Q. I am trying to get back here again as to whose property is Mr. Clyde transporting?

A. I don't think anybody really knows. I think there are many perhaps court cases one way or the other, Mr. Commissioner.

Q. Well—

A. And as far as we are concerned, both in policy and in practice and as far as the legal documents are concerned, insofar as our contract is concerned—

Q. Well, let me ask you this question: Isn't it true that under the laws of Utah and in most other states, if a person is going to transport someone else's goods as a carrier, he must have a certificate of convenience and necessity issued by the—

A. Yes, sir.

Q. Isn't that true?

[fol. 72] A. That is true.

Q. So if Mr. Clyde is transporting your goods, he should have such a certificate, shouldn't he, but if he is transporting his own goods, he doesn't need that, isn't that true?

A. Insofar as those words go, yes, sir, I don't mean to argue but—

Q. Now I am only raising the question for this reason, that it does not concern me as a Commissioner here or whether he has a certificate of convenience or necessity or not, except as you or anybody else as a citizen, but what I am concerned about is that that being the case, does not that add the presumption, since Mr. Clyde is an honorable

man and certainly you are an honorable company, does not that add to the presumption when you delivered the goods to him at your plant in Provo, they were his goods under the contract and when he took to deliver them, the only obligation you had left was to fulfill your part of the contract that says, "We will allow freight." Now isn't that actually what this comes back to?

A. Well, no, sir, insofar as we are concerned—because we are still—we might turn them over to him as we do; we do then turn them over to him—

Q. You do?

A. That's right and we say, "You are going to haul these goods—this pipe?" And he says, "Yes," and we then—

Q. Well, he says more than that here, "I am going to haul," then you are going to pay him?

A. We are going to pay him for hauling them.

Q. Yes.

A. That's right, that is one part of it. Now the other part of it is that we still—and perhaps the words I am [fol. 73] using don't fulfill the requirements but we still must face our own company obligations.

Q. But haven't you fulfilled that when you say to the prime contractor, "We will allow freight," and he comes to you and he says, "Fine, I will transport them myself and you allow me the freight." So you make delivery to him; you have fulfilled all you had to do because you are dealing with the same person that you contracted with?

A. Well but it is the matter of—

Q. At least that is the way it appears to me, Mr. King.

A. Well, the matter is, in the case of a common carrier—

Q. Well, mind you, I think that is an important element in this case and I am not overlooking the other elements which go to this question of interstate commerce, in addition to this, but to me, I don't think we need to—I think we are playing on words in view of the situation when we say that Mr. Clyde, at the time he took delivery in Provo, did not take possession and title because you had fulfilled everything you had agreed to do.

A. Well, sir—

Q. As far as I can see but that is the only question I have and I think you have answered it as you see it.

A. I am no lawyer but I can only state as to our practice and the facts of the cases under consideration.

Q. I appreciate that.

A. That these cases were in interstate commerce and as a matter of fact, parts of the order were shipped by common carrier.

Q. Yes—

A. And I can't see—well, perhaps that is enough.

[fol. 74] Q. But at the time you delivered them to the common carrier with freight allowed, they became Mr. Clyde's property too at that point, didn't they?

A. We paid the freight.

Q. Yes, but under the terms of your contract, in the bill of lading it was f.o.b. Provo?

A. That is what I say, that is the—

Q. I mean the implication to me is exactly the same in both cases. In one case you transport them one way and the other case you transport them another way but I see no difference in the legal implication of who took possession, who had title at that point, because under the terms of your contract, to me that is the distinguishing feature between a contract, f.o.b. Provo, freight allowed, and f.o.b. point of destination.

I mean, absent other things of course that would change that, but as to that standing alone, it is persuasive and I think perhaps conclusive standing alone as to where title passes but I just think of it—to me you don't need to hedge on this particular point.

Mr. Gunther: I observed during the questioning of Mr. Anderson, that Mr. Anderson made the statement, "carrying the pipe in his own truck," or "carrying his own pipe," or "transporting his own pipe." It would be interesting to read that back if it wouldn't be too difficult to find it.

Mr. Anderson: May I comment on this?

Commissioner Sharp: Not at the moment, let's finish with Mr. King. I am finished, I have no further questions.

Mr. Gilmour: Just a couple of questions on redirect.

[fol. 75] Redirect examination.

By Mr. Gilmour:

Q. The Commissioner referred to the Page, Arizona job on which Mr. Clyde was the contractor in the pipe which went to that particular job, were bills of lading in all instances signed by Mr. Clyde's drivers?

A. Yes, sir, they were.

Q. And did those bills of lading show on their face, Page, Arizona, as the destination of the material?

A. They did.

Q. And was Mr. Clyde paid the regularly established tariff freight rate for that haul?

A. Yes, sir, he was.

Mr. Gilmour: That's all. Mr. Commissioner, we could, if it is agreeable, just take a few more minutes and we could finish with Mr. Carter and then depending on Mr. Gunther's convenience or—I realize he has to be—

Chairman Gunther: I have to 1:30, it is to the other Commissioners' convenience.

Mr. Gilmour: If we could take a few minutes to finish with Mr. Carter, then the only thing left would be a very few minutes of testimony of Mr. Clyde and even if you were absent, if it were agreeable with the remaining Commissioners, just a few minutes would conclude the record today.

Chairman Gunther: Is Mr. Clyde here now?

Mr. Gilmour: We thought that—at 2:00 o'clock we requested him to be here and his testimony would take but a few minutes and even if the Chairman were absent, I suppose his testimony could be taken under oath here and [fol. 76] put in the record, at which point, so far as we are concerned, the record would be closed and that would do away with the necessity of a further continuance and the holding of other hearings.

Commissioner Sharp: Off the record.

(Off the record discussion.)

Mr. Gilmour: Call Mr. Carter to the stand.

L. C. Carter, called as a witness on behalf of the taxpayer, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Gilmour:

Q. Your name?
A. L. C. Carter.
Q. And your position with the company?
A. Auditor.
Q. And how long have you been associated with the company?
A. Thirty-four years.
Q. And in what capacities?
A. As a stenographer, accounting clerk, cashier, to my present position.
Q. What is your present position?
A. Auditor.
Q. And when were you appointed to auditor?
A. In 1945.
Q. And you have heard the testimony here of Mr. Nelson and Mr. Anderson and Mr. King and according to your understanding, is such testimony true and correct?
A. Yes.
Q. You are familiar with the sales tax assessment involved here?
[fol. 77] A. I am.
Q. And you have gone over and studied and are familiar with the proposed deficiency as shown in Taxpayer's Exhibit 1?
A. Yes, sir.
Q. From the accounting standpoint, would you describe in your own words how the transactions for the sales of the company's products are handled?
A. At the time an order is entered in our Sales Department, it is sent down to the Accounting Department for first of all a credit approval. At that time we require the Sales Department to furnish us the name and the address of the bonding company, if the job is bonded, and in case the job isn't bonded, we require a legal description of the

property that the pipe is going to be used in in order to protect a mechanic's lien in case it becomes necessary for us to file one to effect payment of our—for the material that we furnish.

Q. And after those matters have been cleared, then what happens in your department?

A. Well, the information is released to the shipping office and upon shipment of the material, they furnish us a list of the material that is shipped, together with a bill of lading and from these documents we prepare an invoice. On that invoice is shown our sales order. It is dated the date shipment is made and it shows the consignee, the f.o.b. point, the freight rates and then we extend the material that is shown on—the pipe is priced by unit prices and we extend that to the total amount of the invoice. On the invoice, if it is prepaid, it is shown that way; where it is shown foundry freight allowed, we make a deduction from [fol. 78] the face of the invoice as the invoice prices shown or are delivered prices in every case and we make the deduction of the freight from the face of the invoice.

Q. And do those invoices of course show the name of the customer?

A. Oh, yes.

Q. They show his address?

A. His address.

Q. They show the destination of the material?

A. That's correct.

Q. And do they refer to the particular job?

A. Always.

Q. In case payment is not received promptly after invoice, what is the procedure of your department in that event?

A. Our regular terms on all shipments is thirty days net from date of shipment. Our Credit Department follows each sale, each invoice. At the end of thirty days, if we don't receive payment, we start a series of collection letters. We follow each individual job very closely to determine if the contractor has been paid by the owner or the governmental unit which may be involved, and if we don't receive our money within a reasonable length of time and we have been advised that the customer of that the con-

tractor has been paid for the material, we immediately notify the bonding company or if it isn't covered by a bond, then we have our Legal Department start proceedings to file a mechanic's lien on that particular piece of property.

Now that has been done all the time. At the present time we have several claims against bonding companies and we have several mechanic's liens filed in the various areas of [fol. 79] the states that we have shipped material to and on that we have not received payment.

Q. Upon the filing of those suits and claims you have never at any time experienced any difficulty by way of proof to show that the materials were delivered to the jobs under consideration?

A. We have never had a single instance that we have not been able to prove that the material went into that particular job.

Q. Mr. Carter, how is the matter of freight handled by your department in the invoicing of material sold as you have described?

A. Well, in the various methods of transportation, whether common carrier by rail or trucks, the material is specified to be prepaid, the carrier will usually furnish us with a freight bill and we log all prepaid freight shipments each day as the shipment is made showing the weight of the material on that particular shipment, the rate and the amount of freight. When the freight bill is issued by the carriers, we go ahead and put the proper distribution on it and pay the freight bills and of course under Interstate Commerce Commission rules, we have to pay those within seventy-two hours after receipt of the freight bill and we make regular payments twice a week on them. Now in the case of where the freight is allowed on the face of the invoice, we merely extend the invoice prices as shown, on the delivered price, and then we compute the freight on so many pounds of such and such a rate for a total freight allowance and deduct that from the total amount of the invoice figured on the delivered prices.

Q. As chief accounting officer, of the company, is it your responsibility to file sales and use tax reports to the [fol. 80] various states where such taxes are payable?

A. Yes, sir.

Q. And in the transactions here involved, were sales and use taxes paid and reports thereon filed in the states of destination where the material was delivered by the company?

A. In the particular shipments involved in this case, there is only one state that we are qualified to collect a use tax and that is in the State of Colorado. On every shipment that has been made to the State of Colorado, we have assessed and collected and paid to the Department of Revenue in Colorado the use tax so assessed and so collected.

Q. And what percentage of the total sales involved in this assessment do such taxes so paid to Colorado represent?

A. 32.3 per cent.

Q. What other shipments to other states which levy a sales or use tax are included within the present assessment?

A. It is my understanding that the State of Arizona, Wyoming and New Mexico has a sales and use tax law. As we are not qualified to do business in those states, we have not assessed that tax but it has been the responsibility of the purchaser to report and pay a use tax to those states.

Q. And what per cent of the total sales involved here are covered by such shipments to Arizona, Wyoming and New Mexico where under the laws of those states the customer would be liable for the payment of sales or use taxes?

A. 36.6 per cent.

Q. And the total of those two groups is what per cent?

A. 68.9 per cent.

Q. And the balance of the assessment to states which according to your understanding at the present time have [fol. 81] no law in force imposing a levy—levying a sales or use tax?

A. That is correct.

Q. And do you expect in any of those states that such laws will be enacted in the future?

A. The information that we have at the present indicates that all of those states will soon adopt a sales and

use tax; however, I might add that in the last legislative session in the State of Idaho, there was a sales and use tax suggested but it didn't pass. It was killed by veto.

Q. Now, Mr. Carter, Commissioner Belnap was interested in the matter of how you compute in your invoicing, say on local intrastate sales, the matter of sales tax where freight is allowed. Would you describe for the record your practice in that respect?

A. Where the freight is allowed in the State of Utah, we compute it after the freight has been deducted on the net amount of the invoice.

Q. And it is your understanding that under the rules and regulations of this Commission and its practice in that respect, that your method of handling the freight in that manner is proper and appropriate under the sales tax regulations of this Commission?

A. That is my understanding and also that has been a case—a court case in the State of California that freight paid is not subject to the California sales and use tax.

Mr. Gilmour: That is all, thank you very much, Mr. Carter.

Cross examination.

By Mr. Howard:

Q. Mr. Carter, upon whom do you consider the risk of [fol. 82] loss to fall in the case of loss when a contractor comes in and picks up material and takes delivery of it in his own truck, sustaining a loss thereafter, upon whom do you consider the risk of loss to fall?

A. Well, the only way I could answer that is that all claims for damages is handled in the Sales Department. I don't have any authority to allow any claim or not allow it, as it is entirely up to them to handle that.

Mr. Howard: I have nothing further.

Mr. Gilmour: Does the Commission have any questions?

Chairman Gunther: Any further questions? If not, then we will resume at 2:00 o'clock.

RECESS

(Whereupon the hearing recessed at 12:45 o'clock P.M. and reconvened at 2:00 o'clock P.M.)

Commissioner Sharp: You may proceed, Mr. Gilmour. Mr. Gilmour: Mr. Clyde.

W. W. CLYDE, called as a witness on behalf of the taxpayer, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Gilmour:

Q. Would you give your name and address?

A. I am W. W. Clyde of Springville, Utah.

Q. And with what company are you associated with?

A. I am President and General Manager of W. W. Clyde Construction Company.

[fol. 83] Q. Would you describe for the record here in your own words the transaction under which you purchased or your company purchased cast iron pipe and fittings for a job which is involved in the present assessment?

A. In the year 1957 we were working in the vicinity of Page, Arizona. The Bureau of Reclamation advertised for bids for the town site of Page which included the waterworks, the sewer lines, the streets and roads, sidewalks and curb and gutter and that year we placed a bid for that work and we were low bidder on it.

Q. And that was a job of the Bureau of Reclamation?

A. Bureau of Reclamation was the contracting—

Q. And that job is one that has been introduced into the—which has been offered into evidence as Taxpayer's Exhibit No. 7. In connection with that job, Mr. Clyde, which involved the furnishing of cast iron pipe and belated fittings, did you receive a quotation from the Pacific States Cast Iron Pipe Company?

A. In stating the figures on that job, it was necessary for us to obtain a quotation on cast iron pipe to be used under the specifications of that job and we accordingly received a quotation from the Pacific States Cast Iron Pipe Company.

Q. Now in your own words and according to your own understanding and impression, where under the arrangements and by whom was that pipe to be delivered at the job site, Page, Arizona?

A. The quotation from the Pacific States Cast Iron Pipe Company was f.o.b. Page, Arizona.

Q. And that was your understanding of the arrangement that you entered into with this taxpayer?

[fol. 84] A. (Witness nods)

Q. In making your bid to the government, you used the prices that were quoted to you by Pacific States?

A. Yes, sir.

Q. Did you, in making your estimate, include any amount therein for Utah sal. tax?

A. We did not. We included the taxes of Arizona.

Q. But not Utah sales tax?

A. Not Utah.

Q. And in the exhibit that has been offered in evidence covering the quotation of the taxpayer to you, there is a reference to an escalation in the price by reason of any possible increases in the base prices of pig iron. Would you comment on that feature?

A. In the quotation from the Pacific States Cast Iron Pipe Company, there was an escalator clause in it and we were awarded—we were slow in getting that job awarded. We had to purchase the pipe, if I remember correctly, before the 10th of June under the escalator clause and we couldn't purchase the pipe until we had a definite award of the job and therefore we were delayed in purchasing it so it was not purchased before the escalator clause expired.

Q. And in fixing your—

A. In other words, the Pacific States Cast Iron Pipe Company, when we did receive the pipe, placed the additional money on the pipe.

Q. But in figuring your estimate in your bid, you did not include any escalated amount?

A. We expected to get that pipe before that escalator clause went into effect but as I remember correctly, the [fol. 85] Bureau of Reclamation did not award that job until thirty to sixty days after the bids were opened.

Therefore, it made us late on getting the job started and we could not receive the pipe or order the pipe until the job was finally awarded to us.

Q. And were you thus, by reason of this pig iron escalation clause, caught in a rather serious situation?

A. The job was figured on a very tight margin and of course when you add $6.00 a ton to it, why it cut our spread down on pipe.

Q. At this point, Mr. Clyde, after this pig iron increase occurred, what did you do then with respect to any discussions with the Pacific States Company regarding the haul of the material to the job site at Page, Arizona?

A. We got in touch with Mr. Nelson of the Pacific Cast Iron Pipe Company and asked him if it would be possible for us to transport the pipe down ourselves on our own transports. We thought probably we could make up some of this $6.00 loss by doing it.

Q. And you were familiar, were you not, that the established tariff rate to Page, Arizona, from Provo was $22.40 a ton?

A. That's right.

Q. And did you discuss with Mr. Nelson whether, in lieu of haulage by common carrier, he would pay you that figure to transport the material?

A. He would allow us that figure if we transported it.

Q. And in fact did you haul the materials and were you paid for that freight in hauling to Page, Arizona?

A. We hauled the bulk of the material down there, the bulk of it. Might not have hauled a few of the fittings because they were not definite, you know. We hauled the bulk [fol. 86] of the material and we were credited with that haul.

Q. Against the delivered contract price?

A. Against the delivered contract price.

Q. And did some of the materials, you say, were they transported by common carrier truck or some of the fittings?

A. As I remember they were or by our trucks. They weren't in truck loads. For instance, on a job like that why you never will know how many valves you are going to have or how many tees and just little odds and ends.

Q. But there were odds and ends that were hauled by common carrier?

A. Yes.

Q. Now you have testified, Mr. Clyde, that according to your understanding of the arrangements and your impression at the time, that in entering into this agreement with Pacific States, that the purchase was f.o.b. job site, destination, Page, Arizona, is that correct?

A. That is definitely that. It was on the proposal from the Pacific Cast Iron Pipe Company.

Q. And according to your understanding and impresssion of those contractual arrangements, it was the definite obligation of Pacific States to get that pipe to you, as buyer, at the job site at Page, Arizona?

A. It definitely was f.o.b. Page, Arizona.

Mr. Gilmour: That's all.

Cross examination.

By Mr. Howard:

Q. Mr. Clyde, I am going to show you a couple of documents, one has been marked Exhibit 7-B for identification and one has been marked as Exhibit 7-E for identification [fol. 87] and I wonder if you could tell me what these are?

A. These are—this is material that went into Page, Arizona, in the water system.

Q. Which are you referring to, sir, which one of the documents were you referring to?

A. Well, this says 13,000 feet went into that job.

Q. Which documents are you referring to?

A. Well, that is a quotation there. That is a quotation. This is a portion of the pipe that went in there, only sixty-six pieces there.

Commissioner Sharp: Would you speak just a little louder so the reporter can get your testimony.

A. This exhibit here, 7-A or whatever it is, is only a portion of the pipe that went into that project.

Q. Have you seen both of these documents before?

A. I have seen this quotation before; yes, and I have seen that. I presume I have it in my records down at the office.

Q. May I call your attention, Mr. Clyde, to the provision of Exhibit 7-E which states "f.o.b. foundry," and the last page of the quotation which states that the contract price is to be "f.o.b. foundry, Provo," and ask you if this would affect your prior testimony in any way that the price was f.o.b. Page, Arizona?

A. Well, we use the f.o.b. price, Page, Arizona, in estimating this job, not f.o.b. Provo.

Q. Don't these documents appear to indicate to you that the price was quoted f.o.b. Provo?

A. Well, we estimated that job now on f.o.b. Page, Arizona, and that is in the quotation from Pacific States Cast Iron Pipe Company, delivered down there.

[fol. 88] Q. Didn't you just testify that this was the quotation from Pacific States Cast Iron Pipe Company?

A. Well, I might check it before—it looks like it but I would have to check it a little more with my own records. I have records in Springville. I don't have them with me. As I remember, we had 13,000 feet of that size pipe but I can check them further and the 19,000 of eight inch.

Q. Doesn't this invoice say, "Sold to W. W. Clyde Construction Company, Springville, Utah"?

A. That is the way I read it.

Q. Doesn't it say, "f.o.b. foundry"?

A. Well, it says foundry there. We received the pipe at the foundry. There is no question about that, we hauled it down there.

Q. Mr. Clyde, upon whom do you consider the risk of loss to have fallen in case of a loss or damage to the pipe in transit after you picked it up in your trucks, carrying it down to Page, Arizona? Upon whom do you consider the risk of loss would have fallen had there been damage?

A. We carry insurance to cover any losses that might be in transporting any materials.

Q. In other words, the risk of loss would have been with your company?

A. No, I don't think so particularly. Our agreement was to take that pipe at f.o.b. Page, Arizona, and we elected to haul it down. We asked permission to haul it down to cover some of this $6.00 a ton escalator clause.

Q. Mr. Clyde, do you have a license from the Public Service Commission?

A. What?

[fol. 89] Q. Do you have a license from the Public Service Commission?

A. I don't think so. You don't need a license to carry your own products.

Q. But none of the trucks that were involved carrying that pipe down to Page, Arizona, had any kind of a license?

A. I didn't have a common carrier license, no, if that is what you are after.

Mr. Howard: I don't believe I have anything more at this time.

Mr. Gilmour: Just a couple of questions on redirect.

Redirect Examination.

By Mr. Gilmour:

Q. Mr. Clyde, when you picked the pipe up at the foundry to transport it to the job site at Page, Arizona, in all cases did your truck driver sign a bill of lading covering the journey to Page, Arizona?

A. That is my recollection they had.

Q. And this paper here which is marked Exhibit 7-D which shows the consignment of pipe material from Pacific States as consignor to your company as consignee, destination, Page, Arizona, I ask whether this signature here is your truck driver's?

A. That is Robert Martin, he is one of our truck drivers.

Q. And in this quotation that Pacific States made to you in connection with the job covering the pipe and fittings which were drawn out of the engineer's specifications, you will notice here "f.o.b. prices are quoted, f.o.b. foundry, Provo, Utah, with full truck load freight allowed in 34,000 pound minimum load to Page, Arizona." Now you have [fol. 90] testified that those were delivered prices and they included that freight of $22.40 a ton, did they not?

A. That is my understanding.

Q. And as you have testified, for the haul and for the weights as shown and tabulated under the bills of lading, you were paid that freight for the haul?

A. Yes, sir, we were credited with that freight.

Mr. Gilmour: I have no further questions, Commissioner.

Commissioner Sharp: That is all then, Mr. Clyde. You are welcome to stay if you would like. Now, let's see, probably voir dire on these that were introduced by Mr. Anderson.

Mr. Gilmour: Yes, they were the Exhibits 1, 2 and 3 were introduced by stipulation but these Exhibits 4 to 7, inclusive.

Commissioner Sharp: And what was the witness—

Mr. Gilmour: Mr. Glade Anderson.

Commissioner Sharp: I believe you can sit right there, Mr. Anderson.

Voir dire examination.

By Mr. Howard:

Q. Mr. Anderson, regarding these Exhibits 4 through 7, are these documents typical of all the jobs wherein purchasers take delivery in this state and thereafter transport the equipment out of the state; are these all typical of these transactions involved?

A. They are typical of this type of arrangement.

Q. Do they purport to be all inclusive or were there other jobs which aren't included in these documents?

[fol. 91] A. Well, sir, you mean this file that we brought for Page, Arizona, does that include everything we had in the file for Page?

Q. No, what I mean is, are these four exhibits all inclusive regarding the item of the tax in controversy or were there other items which are not represented?

A. No, sir, there are many other similar jobs.

Q. The annotations that are on the front covers and pencil markings that appear on many of the exhibits are not intended to be part of the exhibit, is that true?

A. That is my understanding.

Mr. Gilmour: Yes, that is correct, Mr. Howard, those are my own pencil notations to keep them in some kind of order for purposes of presentation to the Commission.

Mr. Howard: And is it my understanding that all of the transactions involved were then sold upon a similar basis in that the purchaser signed a bill of lading upon receipt of the pipe, invoices were later sent and that the documents, all examples here, are typical of everything that—

Mr. Gilmour: That is correct.

Mr. Howard: I have no objection regarding these.

Commissioner Sharp: That is exhibit—what is the first one—4, 5, 6 and 7?

Mr. Howard: That's right.

Commissioner Sharp: They may be admitted in evidence. Do you have anything further?

Mr. Gilmour: We thank the Commission very much for the hearing and know that the record, when it is completed, that you will give it serious and careful consideration and [fol. 92] that we will appreciate being advised of the decision of the Commission as soon as it is made available.

Commissioner Sharp: Do you have anything further?

Mr. Howard: No, I guess not.

Commissioner Sharp: Well then, that concludes the hearing so you don't need to take anything further.

(Whereupon the hearing concluded at 2:20 P.M.)

[fol. 93] Reporter's Certificate (omitted in printing).

[fol. 94]

Before the State Tax Commission of Utah

In the Matter of the Sales and Use Tax Liability of Pacific States Cast Iron Pipe Company.

Decision—May 23, 1961

The above entitled matter came on regularly for a hearing before a lawfully constituted quorum of the State Tax

Commission of the State of Utah on the 4th day of January, 1961, upon petition and notice as required by law; and the petitioner, Pacific Cast Iron Pipe Company, appearing by and through its counsel of record, C. Matthew Gilmour, and the State Tax Commission appearing by and through its counsel, F. Burton Howard; both parties having presented sworn testimony and documentary evidence in support of their respective positions; and the State Tax Commission having heard and reviewed the evidence herein and being fully advised in the law and the premises, hereby makes the following

Findings of Fact

1. That the petitioner, Pacific States Cast Iron Pipe Company, is a Utah corporation qualified pursuant to Utah statutes to do business in the state of Utah and is engaged in the manufacture and sale of cast iron pipe and related items.

2. That on April 12, 1960 the State Tax Commission of Utah, through its Sales and Use Tax Auditing Division, proposed a sales tax deficiency against the petitioner in the amount of $34,192.62, together with interest to April 25, 1960, in the amount of $2,964.43, for a total sales tax deficiency of $37,157.05 as of the date of the deficiency.

3. That on April 12, 1960, the State Tax Commission of Utah, through its Sales and Use Tax Auditing Division, proposed a use tax deficiency against petitioner in the amount of $2,041.39, together with interest to April 25, 1960, in the amount of $112.93 for a total use tax deficiency in the amount of $2,154.32 as of the date of the deficiency.

4. That the sales tax deficiency was for the period of three years, January 1, 1957 to December 31, 1959; and the use tax deficiency was for the period January 1, 1956 to December 31, 1959.

[fol. 95] 5. That the above mentioned use tax deficiency has since been paid.

6. That on April 20, 1960 the petitioner, Pacific States Cast Iron Pipe Company, duly filed with the Tax Commis-

sion its protest and request for hearing before the Tax Commission.

7. That as a result of informal hearings held May 25, 1960 and October 27, 1960, certain items were eliminated from the original sales tax deficiency so that the only transactions now subject to this deficiency are those sales of cast iron pipe and related commodities purchased in the State of Utah where, in all of the instances here involved, the contractor or his agent, as purchaser, received delivery of the materials purchased from petitioner in the contractor's own trucks at petitioner's plant at Provo, Utah.

8. That the sales in question in most cases were negotiated by representatives of the petitioner outside of the State of Utah.

9. That the materials so purchased were purchased for use on specific out-of-state jobs and were of specific sizes and lengths to conform to the specifications covering the particular out-of-state jobs.

10. That Sales Tax Regulation No. 44 as promulgated by the State Tax Commission provides:

> "Sales made in interstate commerce are not subject to the sales tax imposed by the act. However, the mere fact that commodities purchased in Utah are transported beyond its boundaries is not enough to constitute the transaction of a sale in interstate commerce: Where the commodity is delivered to the buyer in this state even though the buyer is not a resident of the state and intends to transport the property to a point outside the state, the sale is not in interstate commerce and is subject to tax.
>
> In determining whether a sale is made in interstate commerce certain general principles will apply. Interstate commerce is not recognized unless there is a movement of a subject of commerce from a point within the territorial jurisdiction of one state across the boundary line to a point within the territorial jurisdiction of another. Each of the following three rules must be complied with to constitute interstate commerce:

1. The transaction must involve actual and physical movement of the property sold across the state line.

2. Such movement must be an essential and not an incidental part of the sale.

3. The seller must be obligated by the express or unavoidable implied terms of the sale or contract to sell to make physical delivery of the property which forms the subject matter of the transaction across a state boundary line to the buyer.

[fol. 96] When tangible personal property is located within the state of Utah at the time of sale and is delivered within the state of Utah such sale is taxable irrespective of where the parties to the contract of sale are located and where the contract was made or accepted or the funds paid. Where tangible personal property is located within the state of Utah at the time of sale, but delivery of the article sold is made at a destination outside Utah and where the seller of the article retains actual physical possession of the article after sale either in person or through an agent until such property is delivered to the purchaser at a destination beyond the boundary of this state, such sale shall be deemed to have been made in interstate commerce and exempt from Utah tax.

Where delivery is made by the seller to a common carrier for transportation to the buyer outside the state of Utah, the common carrier shall be deemed to be the agent of the vendor for the purposes of this section regardless of who is responsible for the payment of the freight charges.

If property is ordered for delivery in Utah from a person or corporation doing business in Utah the sale is taxable even though the merchandise may be shipped from outside the state to the seller or direct to the buyer."

11. That petitioner, as a seller, was not obligated, by the express or implied terms of the contracts herein involved, to make delivery across the state boundary line to the buyer.

From the foregoing findings of fact, the Commission makes the following

Conclusions of Law

1. That the petitioner, under the laws of Utah, is responsible for the collection and payment of sales tax on all items sold by it and delivered to contractors within the state.

2. That the sales transactions which constitute the subject matter of the deficiency assessment are not sales in interstate commerce.

3. That title to all materials purchased from petitioner and delivered to contractors within the State of Utah passed in the State of Utah.

4. That the deficiency against the Pacific States Cast Iron Pipe Company for the period January 1, 1957 to December 31, 1959, together with interest on the principal at the rate of 6 per cent per annum from January 1, 1957 until paid, should be sustained, in the amount of $32,290.18 plus interest.

Wherefore, it is Ordered, Adjudged and Decreed that the sales tax deficiency assessed against the petitioner be and the same is hereby sustained for the taxable period.

[fol. 97] Dated this 23rd day of May, 1961.

By Order of the State Tax Commission, Orville Gunther, Allan M. Lipman, Arias G. Belnap, Herbert F. Smart, Commissioners.

[fol. 98] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF UTAH

Case No. 9493

PACIFIC STATES CAST IRON PIPE COMPANY, a corporation, Plaintiff,

—vs—

STATE TAX COMMISSION, Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE STATE TAX COMMISSION—Filed June 7, 1961

To the Honorable Lester A. Wade, Chief Justice, and the Associate Justices of the Supreme Court of the State of Utah:

Plaintiff respectfully shows:

1. Plaintiff, Pacific States Cast Iron Pipe Company, is a corporation duly organized and existing under the laws of the State of Nevada and qualified to engage in business in the State of Utah.

2. The taxes here involved are sales taxes sought to be imposed against plaintiff by defendant under the provisions of Title 59, Chapter 15, Utah Code Annotated 1953, for the calendar years 1957, 1958 and 1959.

3. The deficiency letter, addressed to plaintiff, P.O. Box 18, Provo, Utah, and signed by Mr. Paul M. Holt, Director, Auditing Division, State Tax Commission, was dated April 12, 1960. This letter proposed to determine and assess against plaintiff additional sales and use taxes covering the period January 1, 1957, to December 31, 1959, as follows:

	Additional Tax	Interest	Total
Sales Tax	$34,192.62	$2,964.43	$37,157.05
Use Tax	2,041.39	112.93	2,154.32
	$36,234.01	$3,077.36	$39,311.37

[fol. 99] A statement attached to the deficiency letter states as follows:

"The proposed sales tax deficiency is due to the following causes:

1. Certain sales claimed to be interstate sales by the taxpayer are not sales in interstate commerce as defined by the sales tax regulations but were sales wherein the delivery was made in the state. Regulation 44 states:

"Sales made in interstate commerce are not subject to the sales tax imposed by the act. However, the mere fact that commodities purchased in Utah are transported beyond its boundaries is not enough to constitute the transaction of a sale in interstate commerce. Where the commodity is delivered to the buyer in this state even though the buyer is not a resident of the state and intends to transport the property to a point outside the state, the sale is not in interstate commerce and is subject to the Tax."

2. Tangible personal property purchased for resale and ultimately consumed by the taxpayer and not reported.

3. Exemption certificates were not on file for certain sales claimed to be for resale.

"The proposed use tax deficiency is due to the taxpayer's failure to report but of state purchases of tangible personal property for storage, use, or consumption in the state."

4. After receipt of the aforesaid deficiency letter, and within the time allowed by law, plaintiff on April 20, 1960, filed with defendant a formal letter of protest against the proposed assessment of taxes by defendant and requested a formal hearing thereon pursuant to the provisions of Section 59-15-12, U.C.A. 1953.

[fol. 100] 5. The aforesaid letter of protest and request for a hearing enumerated nine specific grounds of protest and objection to the proposed assessment as follows:

1. The assessment is invalid, illegal, and unconstitutional by constituting a burden upon interstate commerce, all in violation and contravention of the provisions of Section 8 of Article I of the Constitution of the United States wherein it is provided that the Congress of the United States shall have power to regulate commerce among the several states.

2. The assessment is invalid, illegal and improper and in violation and contravention of the provisions of the taxing statutes prohibiting the State of Utah or the State tax Commission from taxing any sales which the State of Utah is prohibited from taxing under the Constitution or laws of the United States or of the State of Utah, and more especially the provisions of Section 59-15-6, U.C.A. 1953, and Section 59-16-4(b), U.C.A. 1953.

3. The assessment is invalid, illegal and unconstitutional by being discriminatory and by denying to the taxpayer the equal protection of the laws, all in violation and contravention of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 24 of Article I of the Constitution of Utah.

4. The assessment is invalid, illegal and unconstitutional by depriving the taxpayer of property without due process of law, all in violation and contravention of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 7 of Article I of the Constitution of Utah.

5. The assessment is invalid and illegal in part by including sales of tangible personal property for resale and other than retail sales in violation of the provisions of Sections 59-15-2 and 59-15-4, U.C.A. 1953.

6. The assessment is invalid and illegal in part by including sales to the United States Government and to re-

ligious, charitable and eleemosynary institutions in violation of the provisions of Section 59-15-6, U.C.A. 1953.

7. The assessment is invalid and illegal in part by including property purchased for resale in this state and property which enters into and becomes an ingredient or component part of the property manufactured for sale by the taxpayer in violation of the provisions of sub-paragraphs (g) and (h) of Section 59-16-4, U.C.A. 1953.

[fol. 101] 8. The assessment is invalid, illegal and unconstitutional by taxing sales transacted and consummated in other states and outside the jurisdiction of the State of Utah, all in violation and contravention of the provisions of the sales tax law, Chapter 15, Title 59, U.C.A. 1953.

9. The assessment is invalid, illegal and unconstitutional in that the sales in question are either taxed twice or subjected to the risk of double or multiple taxation by the State of Utah, the state of origin, and the states of destination of the products sold and in which the customers reside, all in violation and contravention of the equal protection and due process of law clauses of the Federal Constitution referred to in sub-paragraphs 1 and 3 above.

6. Following receipt of the aforesaid protest letter, defendant scheduled an informal hearing on the matter which was held May 25, 1960. As the result of plaintiff's study and review of the proposed assessment it appeared that there were certain sales and purchases on which tax should properly be imposed, not involving interstate commerce. Consequently, by letter dated May 30, 1960, and in accordance with the suggestion of Mr. Paul M. Holt, Director, Auditing Division, to stop the running of interest on such conceded items, plaintiff forwarded to defendant its check in a total amount of $4,173.49 made up of tax in the amount of $3,925.38 and interest in the amount of $248.11 computed to June 1, 1960. As a result of this payment the

entire balance of the proposed assessment relates to and covers the validity and constitutionality under the Federal Constitution of the sales tax sought to be imposed against the type and class of interstate shipments hereafter to be referred to.

7. One further informal hearing was held on October 27, 1960, with plaintiff reiterating again its contention that the proposed assessment is invalid, illegal and in direct violation and contravention of the Constitution of the United States in that said assessment is an unconstitutional burden upon and interference with interstate commerce, is [fol. 102] discriminatory and denies to plaintiff the equal protection of the laws and deprives plaintiff of property without due process of law.

8. Thereafter, the matter came on for formal hearing before the defendant State Tax Commission at the hour of 10:00 A.M., January 4, 1961, at which hearing witnesses were heard, documentary proof introduced, and a record made of the facts pertaining to the class and type of interstate sales transactions here involved upon which defendant seeks to impose tax.

9. After said formal hearing, to-wit, by Decision 191, dated May 23, 1961, mailed to plaintiff on May 24, 1961, and received by plaintiff on May 25, 1961, defendant erroneously adjudged that the interstate sales transactions which constitute the subject matter of the deficiency assessment were not sales in interstate commerce and sustained the said proposed deficiency in sales taxes for the period January 1, 1957, to December 31, 1959, together with interest on the principal at the rate of six (6) per cent per annum from January 1, 1957, until paid, in the amount of $32,290.18 plus interest.

10. With respect to the said Decision No. 191 of defendant Commission, plaintiff alleges as follows:

a. Defendant erred in paragraph No. 1 in finding that plaintiff is a Utah corporation and in not finding plaintiff is a Nevada corporation duly qualified to transact business in the State of Utah.

b. Defendant erred in paragraph No. 7 in finding that in the transactions now subject to the deficiency are "those sales of cast iron pipe and related commodities purchased in the State of Utah where, in all of the instances here involved, the contractor or his agent, as purchaser, received delivery of the materials purchased from petitioner in the contractor's own trucks at petitioner's plant at Provo, Utah", and in not further finding that all of the sales transactions both by their terms and according to the understand-
[fol. 103] ing of the parties were:

1. Contracts entered into on the basis of delivered prices, including freight at regular published tariff rates, to a particular out-of-state job site, and

2. That said materials were delivered into the purchaser's trucks at Provo, Utah, for the purpose of being hauled under bills of lading and under the contract to the specific out-of-state job site location, and

3. That plaintiff paid the buyers for transporting the materials, as aforesaid, the regular established freight rate by means of credits against the delivered prices as invoiced and billed to said buyers, and

4. That in the transactions here involved all contracts were fully performed according to their terms and in no case did any buyer violate or breach his contract and attempt to divert the materials to local intra-state use within the State of Utah.

c. Defendant was correct in finding in paragraph 8 that the sales in question in most cases were negotiated by representatives of the petitioner outside of the State of Utah but erred in not further finding that all of said sales contracts required for their performance the out-of-state delivery of cast iron pipe and related fittings alongside trench at a specific out-of-state job site.

d. Defendant was correct in finding in paragraph 9 that the materials so purchased were purchased for

use on specific out-of-state jobs and were of specific sizes and lengths to conform to the specifications covering the particular out-of-state jobs but erred in not [fol. 104] further finding that all of said materials were actually transported and delivered across the state line of Utah and actually used on said specific out-of-state jobs in fulfillment of and as required by the contracts of sale in question.

e. Defendant erred in finding in paragraph 11 that plaintiff, as a seller, was not obligated, by the express or implied terms of the contracts herein involved, to make delivery across the state boundary line to the buyer and in not finding to the contrary on the evidence, to-wit, that plaintiff in fact was obligated under the contracts to make and effect delivery of the materials to the buyers at the specific out-of-state job sites.

11. Plaintiff alleges that defendant erred generally in not finding that the sales transactions constitute interstate commerce free and exempt of tax under the federal Constitution, the sales tax statute and Sales Tax Regulation No. 44 of defendant, in that by the evidence presented before the defendant Commission, it was clearly shown, proven and established beyond any doubt whatsoever, (1) that each and every transaction in fact involved the actual and physical movement of the property sold across the state line, (2) that such movement was an essential and not an incidental part of the sale, and (3) that plaintiff seller was obligated to effect a delivery of the property being sold across the state boundary line to the buyer.

12. Plaintiff alleges that each contract of sale here involved was single and indivisible and that even if it be assumed title passed to buyer f.o.b. foundry, defendant erred in breaking the contract down into its several elements, assessing tax on one of the elements taking place in the State of Utah and ignoring the fact that said one element was merely one of a series of steps required in effecting the interstate shipment of plaintiff's product in performance of the contract.

[fol. 105] 13. Plaintiff alleges that defendant erred in not finding that all of the property so sold for use on out-of-state jobs as aforesaid could be subjected to sales or use taxes by the states of destination of such material and that according to the evidence such taxes have actually been so paid, either by plaintiff or its buyers on a large and substantial part of said property so sold with the result that the assessment here proposed would actually in fact constitute double taxation on the same transactions of sale.

14. Plaintiff alleges that it is discriminatory and a denial of the equal protection of the laws under the Federal constitution for defendant to single out for tax those sales transactions of plaintiff where out-of-state delivery was effected by means of customer's trucks and exempt from tax sales transactions where out-of-state delivery was effected by means of common carrier or plaintiff's own trucks.

15. Plaintiff alleges that all of the sales here involved were not consummated and completed locally by unrestricted delivery to the buyers within the State of Utah and that defendant erred in not finding that the buyers took possession of the material at plaintiff's plant in Provo, Utah, for the sole and said purpose of transporting said material to a specific agreed out-of-state location and that if title passed to buyers at plaintiff's plant in Provo, Utah, it did so, as in the case of common carrier shipments, only at the instant of commencement of the interstate journey and as an integral and not a separable, part of a transaction in interstate commerce.

16. Plaintiff is fearful that the present proceeding is merely a preliminary step in an effort of defendant Commission to extend Utah sales tax to the sale of all goods manufactured within the State of Utah exported and shipped to customers outside the state, irrespective of the particular means of transport employed in effecting de-
[fol. 106] livery, on the sole and invalid ground that title under the sales documents may pass to the customer f.o.b. plant in Utah.

17. Plaintiff alleges that other states having similar sales tax statutes as Utah and in which plaintiff's competitors own and operate plants, do not attempt to tax material exported and sold to customers outside the states of manufacture whether delivered by customer truck or common carrier, which will result, if the present assessment is upheld, in plaintiff's transactions being subjected to two taxes, to-wit, at point of origin and point of destination, whereas the transactions of plaintiff's competitors will only be subjected to one tax at point of destination, all to plaintiff's detriment and injury and contrary to the provisions of the Federal constitution hereinbefore referred to.

18. Before making application for a writ of certiorari an undertaking has heretofore been filed by plaintiff, Pacific States Cast Iron Pipe Company, with defendant State Tax Commission, approved by it as to amount and surety thereon, to the effect that if such writ shall be dismissed or the decision of the defendant be affirmed, plaintiff will pay the taxes, interest and other charges, audited, and stated in said decision, plus the costs and charges which may accrue against plaintiff in the prosecution of this case, which said undertaking was filed as required by statute and as a condition precedent to the filing of this petition and the review by this Honorable Court of said decision upon both the law and the facts.

Wherefore, plaintiff prays that a writ of certiorari issue under the seal of this Court, directed to defendant, commanding defendant to certify its record to this Court, said record to include all the proceedings and the evidence taken in said cause, to the end that said cause may be reviewed by this Court as by law provided; that the decision therein [fol. 107] of defendant be reversed, set aside and annulled; and for such other and further relief as to this Court shall appear just and equitable in the premises.

Dated this 7th day of June, 1961.

C. M. Gilmour, Attorney for Plaintiff, 422 Kearns Building, Salt Lake City, Utah.

Duly sworn to by E. J. Nelson, jurat omitted in printing.

[fol. 108]

IN THE SUPREME COURT OF THE STATE OF UTAH

WRIT OF CERTIORARI

The State of Utah to the State Tax Commission:

Whereas, it manifestly appears to us by the verified petition for writ of certiorari by Pacific States Cast Iron Pipe Company, a corporation, the party affected, that in that certain proceeding before you involving the redetermination of an alleged deficiency of sales tax imposed by Chapter 15 of Title 59, Utah Code Annotated 1953, upon Pacific States Cast Iron Pipe Company for the calendar years 1957, 1958 and 1959, you rendered your decision on the 23rd day of May, 1961 to review which decision Pacific States Cast Iron Pipe Company has filed its petition for writ of certiorari in this Court, praying among other relief that your said decision be annulled, and it further appearing that the said Pacific States Cast Iron Pipe Company has fully complied with all conditions precedent to the review prayed and the filing of said petition and the issuance of said writ thereupon being within the right of the said Pacific States Cast Iron Pipe Company as by law and the statutes provided;

Now, Therefore, we command you that you certify fully and send to this Court not later than the 30 day of June, [fol. 109] 1961, your record in said cause including all the proceedings and all the evidence, both oral and documentary, taken in the case, together with all things touching the same, as fully and entirely as it remains before you, that the same may be reviewed upon both the law and the facts and the lawfulness of your decision in said matter be inquired into and determined by this Court and that in the meantime you desist from further proceeding therein.

Witness, the Honorable Justices of our Supreme Court at the State Capitol Building, in Salt Lake City, in Salt Lake County, State of Utah, this 7th day of June, 1961.

L. M. Cummings, Clerk, by Irma C. Pope, Deputy Clerk.

(Seal)

Received service of the above Writ this 7th day of June, 1961.

G. W. Barben, Executive Secretary, State Tax Commission.

[fol. 110]

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 9493

PACIFIC STATES CAST IRON PIPE COMPANY, Plaintiff,

v.

STATE TAX COMMISSION, Defendant.

OPINION

HENRIOD, JUSTICE:

Review of a tax assessment levied for alleged sales tax liability incident to the sale of pipe to a nonresident purchaser taking delivery, not by common carrier, but in his own equipment at the pipe company's foundry in Utah, delivering it himself to an out-of-state destination designated in the contract. Reversed.

The question: whether *under the facts of this case*, delivery in Utah to the purchaser, coupled with actual transportation by him to an out-of-state destination transmutes an erstwhile interstate shipment, whose taxability by Utah concededly would be invalid, as being a burden on interstate commerce under the commerce clause,[1] into a taxable intrastate transaction not burdensome to interstate commerce.

It is conceded that had the pipe been delivered to a common carrier consigned to an out-of-state purchaser, the sale would not have been taxable in Utah. Also, that delivery was taken in Utah by the out-of-state purchaser in his own

[1] Art. I, Sec. 8, U. S. Constitution, having to do with federal power "to regulate Commerce . . . among the several states . . ."

equipment, actually transported from the pipe company's foundry directly, and without interruption, to the out-of-state destination called for by the contract and bill of lading.

It seems to be undisputed also that: The pipe company makes and sells pipe in 11 western states. Delivery mostly is in interstate commerce by common carrier or in the company's own equipment. As has been said, the out-of-state purchaser took delivery here in his own equipment. The contract called for out-of-state shipment, and the pipe company set the destination price which included the going common carrier freight charge between the two points. In this case such tariff was credited to the purchaser. The bill of lading and contract of sale clearly demonstrated an understanding by both seller and buyer that the pipe was to be shipped to an out-of-state destination, to be used on a municipal project, under engineered specifications, federally okayable because of federal fiscal participation. Under such contract, bills of lading and the highly detailed specifications, it was quite improbable, if not almost impossible, to conclude other than that the goods could not be diverted to any other or intrastate consumption. Also, it appears inescapable to conclude from the record in this case, other than that there was no effort or intent to circumvent any tax laws in virtue of the use of any contractual or transportational format designed to deceive. All of the evidence adduced points up a certainty of interstate shipment that would override any suggestion that the products were to be consumed or stored in Utah. The contract clearly evinced a contemplated interstate shipment. The contention of the Tax Commission that the documents of sale and transportation were an evasive gesture to avoid taxation, and that the goods *could have been diverted to a local use*, simply is not sustained by the facts since the goods actually reached their consigned destination. Nor would the cases seem to [fol. 110a] sustain such a contention.[2] Had they *in fact*

[2] United Fuel v. Hallanan, 257 U.S. 277, 42 S.Ct. 105, 66 L.Ed. 234 (1921): "The typical and actual course of events marks the carriage of the greater part as commerce among the States and theoretical possibilities may be left out of account." Hughes Bros. v. Minnesota, 272 U.S. 469, 47 S.Ct. 170, 71 L.Ed. 359 (1926):

been so diverted the most that could be said is that there would have been a contractual breach respondable in damages, and perhaps reflecting a circumstance justifying the imposition of a Utah sales tax on an intrastate transaction.

The Tax Commission demurs to the pipe company's contention that the facts of this case unerringly point up an unburdenable interstate shipment, commerce clausewise. It points to several facts which it claims are conclusive of the intrastateness of this sale: 1) that delivery was taken here,[3] that title passed here,[4] and that the risk of loss shifted here. It urges that delivery, etc. constituted a "taxable event" invulnerable to any claimed offense against the commerce clause. Ordinarily it would be right.[5] But delivery here, as a technical matter, cannot transcend the interdictions of the commerce clause, if, piercing the veil of technicality, based on the particular facts here, substance re-

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"The mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation . . ."

[3] The Richfield Oil case, post, negatives this concept.

[4] In re Glove Varnish Co., 114 F.2d 916 (1940): ". . . we think it makes no difference when the title passed, and we are unable to perceive how that fact, whenever it occurred, could be determinative of the character of the sale, as to whether it was an interstate or intrastate transaction." The Pipe Line Cases, 234 U.S. 548, 34 S.Ct. 956, 58 L.Ed. 1459 (1914): ". . . the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce." Hughes Bros. v. Minnesota, 272 U.S. 469, 47 S.Ct. 170, 71 L.Ed. 359 (1926): "We do not think it important, for purposes of this case, to decide where title to the timber was at the time the drive began." Spalding v. Edwards, 262 U.S. 66, 43 S.Ct. 485, 67 L.Ed. 865 (1923): "Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use." Also: Dahnke-Walker v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921).

[5] McGoldrick v. Berwind-White, 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876 (1940). International Harvester v. Dept. of Treasury, 322 U.S. 340, 64 S.Ct. 1019, 88 L.Ed. 1313 (1944).

flects a situation offensive to the commerce clause. We think this case, in substance, pierces that veil.[6]

The Commission relies heavily on International Harvester v. Dept. of Treasury[7] to support its contention. That case, on stipulated facts, simply generalizes that "Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state "would be taxable because of a local taxable event." If that were all we had in the instant case, our decision would be an antithesis, since, to reduce the above commentary to its own words, it simply implies, for example, that if a Utahn visits New York and buys wearing apparel with the intent of wearing it en route back to and in Utah thereafter, the sale is taxable in New York, inoffensive to the inhibitions of the commerce clause. No corollary, no analogy applies here. The New York seller is unconcerned as to whether the vestment be worn out in Utah or elsewhere. But if the contract were to ship 1,000 suits of clothes to a retailer in Utah without anything else, the import of such a contractual arrangement would reflect an interstate shipment that if taxed by New York, would do injustice to the traditional and historic concepts anent interstate commerce and its inviolability by local tax burdens. The International Harvester case, its forebears and successors, have provided fuel for a judicial fire over the years with respect to close factual [fol. 111] situations, but the instant case in substance lends itself to no factual obscurity or uncertainty of contemplated result, such as to be dominated by that case and any others cited that might confuse, but do not decide the case here. We leave that confusion to those who have discussed it, and to their observations appurtenant thereto, a couple of which we refer to the reader for a review of the cases covering this whole field[8] which are discussed better there than

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[6] "... substance and not form controls in determining whether a particular transaction is one of interstate commerce ..." Heyman v. Hays, 236 U.S. 178, 35 S.Ct. 403, 59 L.Ed. 527 (1915).

[7] Supra, note 5.

[8] New Light on Gross Receipts Taxes, 53 Harvard Law Review; Sales Taxation of Interstate Commerce, Univ. of Detroit Law Journal, Vol. 18, p. 416.

space justifies here. If the International Harvester case created any dubitability as to application in the case here, it was laid at rest by its author, who later fathered Richfield Oil v. State Board,[9] involving an attempted sales tax imposition on a transaction where oil was delivered to a foreign purchaser's equipment in a local harbor, wherein Mr. Justice Douglas had this to say:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. *But the same degree of certainty may exist though no common carrier is involved.* The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. . . . That delivery marked the commencement of the movement of the oil abroad. It is true . . . that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser *and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to a domestic use.* It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. *The means of shipment are unimportant so long as the certainty of the foreign destination is plain.*"

We think our case is bottomed on facts so certainly pointing up an interstate shipment free from local tax burdens, as to transcend, even, the facts and conclusions reached in the Richfield Oil case. It is the substance of it that counts, —not technicalities of delivery, title or assumption of risk, else the commerce clause would suffer senility and impotence.[10]

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[9] 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946).

[10] ". . . substance and not form controls in determining whether a particular transaction is one of interstate commerce and hence the mere method of delivery is a negligible circumstance if in substantial effect the transaction *under the facts of a given case* is interstate commerce." Heyman v. Hays, supra.

Both sides have pointed to our statute[11] and Tax Commission Regulations[12] which purport taxwise to include or exclude a particular transaction. The Regulations, no matter how definitive of what a taxable event is, cannot obfuscate the true purpose and intent of the commerce clause. That clause contemplates facts and substance, and not definitions amounting to legal conclusions. We say this, conceding our disposition to sustain administrative agencies enjoying a greater degree of expertness in their field than do we. But we cannot interpret a conceded factual situation pointing to an interstate shipment, to result in victimization by a regulatory definitional legal conclusion, urged as being controlling over facts defying it. (Emphasis supplied.)

We Concur:

Lester A. Wade, Chief Justice, E. R. Callister, Jr., Justice.

[fol. 111a] CROCKETT, JUSTICE: (Dissenting)

I dissent. It has long been held by the Supreme Court of the United States that a state may tax sales made within its borders even though it is the intent of the buyer to remove the items to another state prior to using them.[1] This rule was clearly set forth by Justice Douglas in International Harvester v. Department of Treasury:[2] "... a local transaction [sale] is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce," and concluded that "those in interstate trade could not complain if interstate commerce carried its share of the burdens of local government which helped sustain it."

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[11] Title 59-15-2, Utah Code Annotated 1953, and subdivisions.

[12] Regulations 31 and 44, Utah Sales Tax Regulations.

[1] See Department of Treasury v. Wood Preserving Corp., 313 U.S. 62; McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 331.

[2] 322 U.S. 340.

I see no reason why the facts of the instant case require a result different from that in International Harvester. In that case the court held taxable "Sales by branches [Pacific States Pipe Co.] located in Indiana [Utah] to dealers and users residing outside of Indiana [Utah], in which the customers came to Indiana and accepted delivery to themselves in this state." The only fact not identical in the case now before us is that some of the buyers were also Utah companies who accepted delivery in Utah but intended to ship or transport the pipe to other states for use there. I submit that this change in the facts, if anything, makes the sales even more clearly taxable by Utah than those in the Harvester case.

The majority opinion seeks to avoid the long-standing rule of the Harvester case by relying on the case of Richfield Oil v. State Board.[3] But the cases are completely different. The Richfield case, decided three years after the Harvester case, involved the sale for *export* of oil to the government of New Zealand, which was delivered to the purchasers' ships in a California port. The U. S. Supreme Court struck down the attempted taxation of the sale by California on the basis of the export clause of the U. S. Constitution, which provides simply that: "No state shall . . . lay any Impost or Duty on Imports or Exports."[4] In doing so, Justice Douglas, who had authored the opinion in the Harvester case, made it clear that the decision did not run contrary to the law announced in the Harvester case. The latter was governed by the commerce clause of the U. S. Constitution. Its language is general, granting to Congress the power "to regulate commerce . . . among the several states."[5] As stated above, the Supreme Court has interpreted this to mean that while interstate commerce may be required by the states to pay its own way, no state may encroach upon the power of Congress to regulate it by placing an undue burden on the interstate flow of goods. Whereas, in the Richfield case, the court was not concerned

[3] 329 U.S. 69.

[4] Art. I, Sec. 10, Constitution of the United States.

[5] Art. I, Sec. 8, Constitution of the United States.

with the reasonableness of a burden, but only with the simple and direct prohibition against imposing a tax on exports.

Justice Douglas pointed out that the two constitutional provisions, while related, are not exactly the same. He elaborated on the reasons for the different rules thus:

> "... the law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits ... and by invalidating those which discriminate against interstate commerce, which im- [fol. 112] pose a levy for the privilege of doing it, which place an undue burden on it. ...
>
> It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress."

He further pointed out that this distinction accounted for the different result upholding the Mississippi sales tax in Superior Oil Co. v. Mississippi[6] where the facts were almost identical with those in the Richfield case except that the oil was being transported to Louisiana for resale by the purchaser rather than to a foreign country.

The facts of our case clearly show sales made in Utah which have been held unequivocally by the U. S. Supreme Court to be a "taxable event"; and that a tax levied on such sales by a state does not run afoul of the commerce power of the Federal Government. I am not aware that there has been any great reluctance on the part of the appropriate agencies of the Federal Government to exercise their authority or to assume the full measure of their responsi-

[6] 280 U.S. 390.

bility. No reason is suggested, and I think none exists, why this court should be over-solicitous in extending federal controls over business transactions within this state.

To rule that where a sale is made in Utah it is not subject to a sales tax merely because the item purchased is to be taken to another state, would open an avenue to easy avoidance of the tax by the customer simply declaring his intention to take the purchase elsewhere; would provide a basis for charging tax to some customers and not others; would give rise to untold mischief in administration and to extensive loss to the state of revenue to which it is entitled.

The difficulties just pointed out and the unreasonableness and impracticality of the majority's conclusion is further emphasized by the fact that adjoining states have a use tax law, similar to our own, which provides that property brought into the state is subject to a use tax, equivalent to the sales tax, but exempts the property from the use tax if a sales tax is paid.[7] Thus under the majority decision Utah would lose the sales tax on these transactions made within our state to which the state is entitled; and the equivalent tax would be collected by a foreign state. On the other hand, foreign states in all likelihood would collect sales taxes on similar sales, and when such purchases were brought into Utah, our use tax could not be collected.[8]

The foregoing emphasizes the propriety and the desirability of adhering strictly to the provisions of our statutes which levy sales tax on "every retail sale of tangible personal property made within the state of Utah."[9] But they exempt "sales which the state of Utah is prohibited from taxing under the Constitution or laws of the United States."[10] It could not be plainer that the legislature intended to tax all sales made within the state insofar as it has authority to do so. It is for the legislature to determine

[7] For discussion of this proposition see Butler v. Tax Comm., —— Utah ——, 367 P.2d 852.

[8] Ibid.

[9] Sec. 59-15-4, U.C.A. 1953.

[10] Sec. 59-5-6, U.C.A. 1953.

how the taxing power of the state should be used, and it is not the function of this court to examine the policy behind the tax. It is hardly necessary to point out that the residuum of power rests with the states and is limited only by those expressly granted by the Federal Constitution to the Federal Government.[11] The United States Supreme Court is the final authority in interpreting that document. When it has spoken and laid down a clear rule regarding [fol. 112a] the commerce clause which governs the issue here presented, it is not our prerogative, nor should it be our desire to redefine those limits ascribing additional controls over activities within our state.

The Tax Commission, upon competent evidence, expressly found that the transactions in question were sales made within the state of Utah. That finding is unassailable and the tax is payable. The decision should be affirmed.

McDonough, J. concurs in the views expressed in the opinion of Mr. Justice Crockett.

[fol. 113]

IN THE SUPREME COURT OF THE STATE OF UTAH

Regular February Term, 1962

No. 9493

PACIFIC STATES CAST IRON PIPE COMPANY, a corporation, Plaintiff,

v.

STATE TAX COMMISSION OF UTAH, Defendant.

JUDGMENT—February 20, 1962

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the order of the State Tax Commission be, and the same is, reversed.

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[11] Amendment 10, Constitution of the United States.

[fol. 114]

IN THE SUPREME COURT OF THE STATE OF UTAH

[Title omitted]

PETITION FOR REHEARING

To the Honorable Members of the Supreme Court of Utah:

The respondent, State Tax Commission of Utah, petitions the Court to grant a rehearing in the above entitled cause. In so doing, the Tax Commission is not unmindful of the reluctance of any Court to hear the outraged protestations of a party unfortunate enough to have run afoul of a majority decision. Likewise, the Tax Commission con-
[fol. 115] siders it improper and unbecoming an arm of state government to request a reconsideration of matters adequately considered and determined. The Tax Commission is further aware of the burden[1] which it must meet in order that its petition herein may be granted. Respondent's only concern is with obtaining an adequate adjudication of matters which it must administer and with which it must live as it attempts to fully and fairly administer the tax laws of this state. Accordingly, and in the interests of information and clarity, and fairness to all concerned, a rehearing is respectfully requested and a reconsideration of the decision herein urged.

[fol. 116]

IN THE SUPREME COURT OF THE STATE OF UTAH

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—March 26, 1962

Upon consideration of the Petition for Rehearing heretofore filed herein, and the arguments of counsel thereupon had, it is ordered that a Rehearing be, and the same is, denied.

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[1] "No rehearing will be granted where nothing new and important is offered for consideration." *Duchesne* v. *House*, 4 Ut. 483, 11 Pac. 618;

"A rehearing should not be applied for unless the Court has misconstrued or overlooked some material fact or facts, or has overlooked some statute or decision which may affect the result, or has based the decision on some wrong principle of law, or has misapplied or overlooked something which materially affects the result." *Cummings* v. *Nielson*, 42 Ut. 157; 129 Pac. 619.

[fol. 117]

IN THE SUPREME COURT OF THE STATE OF UTAH

[Title omitted]

MOTION TO RECALL REMITTITUR

Comes now the defendant, State Tax Commission of Utah, and moves the Court for entry of an order recalling the remittitur to the defendant, State Tax Commission of Utah, and directing that the record in this case be returned to this Court.

This motion is made for the reason that defendant desires to petition the United States Supreme Court for a writ of certiorari, and the United States Supreme Court has held that it is without jurisdiction where a writ is directed to an administrative tribunal rather than to a Court. *Staten Island R. Co. v. Transit Commission*, 276 U.S. 603. Recall of the remittitur and return of the record to this Court will enable defendant to seek review of the important questions involved in this case.

A. Pratt Kesler, Attorney General, F. Burton Howard, Asst. Attorney General, Attorney for Defendant, State Capitol Building, Salt Lake City, Utah.

[fol. 118] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF UTAH

[Title omitted]

ORDER RECALLING REMITTITUR—April 16, 1962.

This matter coming on regularly to be heard before the Court on motion of defendant, State Tax Commission of Utah, praying for the issuance of an order recalling the remittitur of this Court heretofore issued and directing defendant, State Tax Commission of Utah, to return the record in this cause to this Court, counsel for both parties appearing and good cause appearing therefor.

It Is Hereby Ordered that the remittitur heretofore issued be and the same is hereby recalled and defendant, State Tax Commission of Utah, is hereby directed forthwith to return to this Court the record in this cause.

Dated this 16 day of April, 1962.

LESTER A. WADE, Chief Justice.

[fol. 119] DESIGNATION OF RECORD TO BE CERTIFIED (omitted in printing).

[fol. 121] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 122]

SUPREME COURT OF THE UNITED STATES

No. 178—October Term, 1962

STATE TAX COMMISSION OF UTAH, Petitioner,

vs.

PACIFIC STATES CAST IRON PIPE CO.

ORDER ALLOWING CERTIORARI—October 8, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of Utah is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

[fol. 123]

BEFORE THE STATE TAX COMMISSION OF UTAH

Exhibit 4(a)

PLATTE CANYON WATER AND
SANITATION DISTRICT

LITTLETON, COLORADO

SPECIFICATIONS

FOR

CONSTRUCTION OF STEEL AND CAST IRON
PIPELINES ON SOUTH SHERIDAN BOULEVARD
AND ADJOINING STREETS

BOARD OF DIRECTORS

Ray Duboc—President

Thor Gredahl—Secretary

Robert Koran—Treasurer

E. W. Grant
George Hansen
Robert Flynn—Attorney

DALE H. REA, CONSULTING ENGINEER

Littleton, Colorado

July, 1959

SPECIFICATIONS NO. 19-201

[fol. 124]

NOTICE TO BIDDERS

Sealed Proposals in single, endorsed "Construction of Steel and Cast Iron Water Transmission Pipelines", for the Platte Canyon Water & Sanitation District, will be received at the office of DALE H. REA, CONSULTING ENGINEER, until 5:00 P.M., M.S.T., August 11, 1959, at which time and place bids will be publicly opened and read aloud in the presence of bidders or their duly authorized representatives.

Specifications and forms for preparing bids may be obtained at the office of DALE H. REA, CONSULTING ENGINEER, 2200 WEST CHENANGO, LITTLETON, COLORADO. A deposit of Twenty-five ($25.00) dollars will be required for each set. This deposit will be returned on one set of specifications to those submitting bids. Upon return of each set by anyone not submitting a general bid on or before the date set for opening of bids, Twenty ($20.00) dollars will be returned by the Engineer. *No refund will be made on plans and specifications returned after the date set for opening of bids.*

All bids must be accompanied by a certified check payable to the Platte Canyon Water & Sanitation District, in an amount of at least five (5%) percent of the bid, drawn on a bank which is a member of the Federal Reserve System or a bidder's bond in like amount. The check or bond will be retained by the Platte Canyon Water & Sanitation District as liquidated damages if the successful bidder refuses or fails to enter into a contract and performance bond in accordance with his bid when notified of the award.

The extent of the work is approximately as follows:

1. Installation only of approximately 5,276 L.F. of .188" × 18" OD Coal tar enameled welded steel pipe and approximately 5,358 L.F. of .188" × 16" OD Coal tar enameled welded steel pipe.
2. Furnish & Install four (4) 5' manholes, complete with air inlet and air release valve.

3. Furnish & Install two concrete vaults for 6" blow-off & inspection manholes.
4. Furnish & Install approximately 9,692 L.F. of 12" C.I. T.J. Pipe, Class 150, Fed. Spec. WW-P-421a, with valves & fittings.
5. Furnish & Install approximately 1,855 L.F. of 8" C.I. T.J. Pipe, Class 150, Fed. Spec. WW-P 421a, with valves & fittings.

The entire proposal will be awarded only to one bidder. The Owner reserves the right to delete all or part of the cast iron pipeline.

Bids may not be withdrawn for a period of thirty (30) days after the time fixed for closing them. The Owner reserves the right to waive irregularities, to waive technical defects accordingly as the best interest of the Owner may be served and may reject any and all bids.

BY ORDER OF THE PLATTE CANYON WATER & SANITATION DISTRICT:

ATTEST:

.....
President

First Publication .....
Third Publication .....

.....
Secretary

Second Publication .....

[fol. 125]

INSTRUCTIONS TO BIDDERS

1. CONTRACT DOCUMENTS.

Attached hereto and bound herein and all made a part and parcel hereof, and herein referred to as the "Contract" are copies of:

a. Notice to Bidders
b. Instructions to Bidders
c. Bid Bond
d. Performance Bond
e. Contract
f. Notice of Award
g. Notice to Proceed
h. Proposal
i. Drawings
j. Specifications
k. Addenda

2. DEFINITIONS.

a. Owner:—The Individual, Partnership, Corporation, City, a District or subdivision of government, as represented by one of its officers or other authorized representatives, entering into the Contract to have the work covered by these specifications performed.

b. Bidder:—Each or any of the persons, partnerships, associations or Corporations making proposals for the performance of the work covered by these specifications.

c. Contractor:—The person, firm, association or corporation entering into the Contract for the performance of the work covered by these specifications.

d. Engineer:—DALE H. REA, Consulting Engineer, or his duly authorized agent.

3. PROPOSALS.

a. Bids shall be made upon the form therefore furnished herein with all items properly filled out. Numerals shall be written in ink and the signature of all persons signing shall be in longhand. Amounts stated in words shall control over figures. The complete form shall be without interlineation, alteration or erasure.

b. No modification or alternate proposals shall be considered, except as specifically called for in the proposal, or provided elsewhere herein.

c. No oral or telegraphic proposals or modifications shall be considered.

d. A certified check, or bid bond, as described in the "Notice to Bidders" must accompany each bid.

4. WITHDRAWAL, AWARD OR REJECTION OF BIDS.

Bids may be withdrawn by the bidder prior to, but not after, the hour set for the opening of bids. The Contract will be awarded to the lowest responsible bidder complying with the conditions of this invitation for bids,

provided his bid is reasonable and it is to the best interest of the Owner to accept it. The Bidder to whom the award is made will be notified in writing at the earliest possible date. The Owner however, reserves the right to reject any and all bids and to waive any informality in bids received whenever such rejection or waiver is to the interest of the Owner. An unbalanced proposal may also be grounds [fol. 126] for rejection, that is each item of work in the schedule should carry its own proportion of the cost. The Owner also reserves the right to reject the bid of a bidder who has previously failed to perform properly, or complete on time, contracts of a similar nature, or the bid of a bidder who is not in a position to perform the contract, or actively prosecute the work to completion. The Owner expressly reserves the right to determine whether or not a bidder is a "responsible bidder" under the terms of this paragraph, and the decision of the Owner concerning the same shall be final and conclusive.

5. INTERPRETATIONS.

Every request for interpretations of any of the Contract Documents shall be made in writing and addressed to the Engineer. Each person making the request will be fully responsible for its delivery to the Engineer. If the point in question is not clearly and fully set forth a written bulletin of instructions, or addenda, will be mailed or delivered to each person obtaining a set of forms for preparing bids as provided in the proposal. No oral instructions, interpretations, or representations shall be binding upon the Owner.

6. SUBSTITUTIONS FOR PATENTED AND SPECIFIED ARTICLES.

Any patented or specific article or process mentioned by name in the Drawings or Specifications are for the purpose of facilitating descriptions, and shall be deemed to be followed by the words "or equal". Any substitute article or process offered by the Contractor may be used when authorized in writing by the Engineer if, in the opinion of the Engineer, it is equal in every respect to the

patented or specific article; however, if it is not equal in every respect, the Contractor must furnish the article or process specified or one that in the opinion of the Engineer is equal thereto in every respect. When called for in the proposal the bidder shall list the type, manufacturer and other pertinent information on specific articles to be incorporated into the work and on which his proposal is based. When the successful bidder fails to furnish said list, award will be made on the basis of furnishing the articles called for in the specifications.

7. LAWS.

Bidders shall familiarize themselves with the provisions of the laws of the City, County and State in which the work is performed pertaining to the character of the work to be undertaken.

8. BIDDERS INTERESTED IN MORE THAN ONE BID.

If more than one bid be offered by any party, by or in the name of his or their clerk, partner, or any other person, all such bids may be rejected. This shall not prevent a bidder from submitting alternative bids when called for, nor from quoting different prices on different qualities of material or different conditions of delivery. A party who has quoted prices on materials to a bidder is not thereby disqualified from quoting prices to other bidders or from submitting a bid directly for the materials or work, as a subcontractor.

9. AWARD OF CONTRACT.

All checks or bidders' bonds shall be returned promptly [fol. 127.] except those being considered for award, which will be returned upon award of Contract or after a lapse of thirty (30) days from the opening of bids. The Contract will be awarded within thirty (30) days after the opening of bids unless all bids are rejected. The successful bidder will be required to execute the Contract and Performance Bond and furnish the required certificates of insurance

within ten (10) days of receipt of the Notice of Award to him. His check or Bidders Bond shall be returned upon completion of the Performance Bond.

10. EXTRA BID BOND AND PROPOSAL FORMS.

Enclosed are one unattached bid bond and two proposal forms. The bidder's formal proposal and bid bond shall be submitted on these unattached forms in lieu of the forms bound in the Contract Documents. One copy of the proposal form may be retained by the bidder as his record. The plans and specifications along with the filled out unattached forms shall be submitted as the bid.

[fol. 128]

BID BOND

KNOW ALL MEN BY THESE PRESENTS, That .....
.....
as Principal...., and .....
as Suret..... are held and firmly bound unto the .....
..... (hereinafter called "Owner") in the penal sum of ..... Dollars ($.....) lawful money of the United States, for payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally by these presents.

THE CONDITIONS OF THIS OBLIGATION IS SUCH that whereas the Principal.... ha.... submitted the accompanying bid dated ..... 19.....
for .....
.....

WHEREAS, the Owner has required the Principal.... to furnish either a certified check equivalent to not less than five percent (5%) of the amount of said bid or a bid bond in like amount, conditioned that in event of failure to execute the proposed Contract and the Performance Bond within the time specified if the Contract is awarded to him, that said sum to be paid immediately to the Owner as liquidated damages and not as a penalty for the principal.... failure to perform.

NOW, THEREFORE, if the principal shall, within the period specified therefore, and on the attached prescribed forms presented to him for signature, enter into a written contract with the Owner in accordance with his bid as accepted and give a Performance Bond with good and sufficient surety, or sureties, as may be required upon the forms prescribed by the Owner for the faithful performance and the proper fulfillment of said Contract, or in the event of the withdrawal of said bid within the time specified, or upon the payment to the Owner of the sum determined upon herein as liquidated damages, and not as a penalty in the event the principal fails to enter into said Contract, and shall give such Performance Bond within the time specified, then this obligation shall be void and of no effect, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the above bounden parties have executed this instrument under their several seals this ..... day of ..... 19..... the name and corporation seal of each corporated party being affixed hereto and these presents duly signed by its undersigned representatives pursuant to authority of its governing board.

.....	.....
Principal (Contractor)	Address
By	ATTEST: .....
.....	.....
Surety	Address
By	ATTEST: .....
Attorney in Fact	

[fol. 129]

NOTICE OF AWARD

....., Colorado

.....

(Date)

TO: .....

.....

.....

The Owner having duly considered the Proposal submitted on ....., 19 ..., for thy work covered by the Contract Documents titled and numbered

....., and it appearing that your Proposal is fair, equitable, and to the best interest of the Owner, the said proposal is hereby accepted at the bid prices contained therein.

In accordance with the terms of the Contract Documents, you are required to execute the Contract and Performance Bond in four counterparts within ten (10) consecutive days from and including the date of this notice.

In addition you are requested to furnish at the same time Certificates of Insurance evidencing compliance with the requirements for insurance stated in the Contract Documents.

The Bid Security submitted with your Proposal will be returned upon execution of the Contract, furnishing of the required Performance Bond and certificates of insurance within the time limit specified. In event that you should fail to execute the Contract agreement and Performance Bond within the time limit specified said Bid Security will be retained by the Owner as liquidated damages and not as penalty for the delay and extra work caused thereby.

BY .....

TITLE .....

ATTEST:

BY .....

[fol. 130]

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS:

That .....

.....

as principal.... and .....

.....

a corporation organized and existing under and by virtue of . e laws of the State of ..... AND AUTHORIZED TO TRANSACT BUSINESS WITHIN THE STATE OF COLORADO as suret...., for valuable consideration are held and firmly bound unto the .... (Hereinafter called the "Owner") and to all subcontractors and persons who have furnished or shall furnish materials actually used in the performance of the hereinafter mentioned Contract, or who may have performed or shall perform labor in the performance of or in connection with, the said Contract, in the penal sum of .....

.....

Dollars ($.....) together with the interest thereon at the rate of eight per centum (8%) per annum from the time when any payment in accordance with the hereinafter mentioned Contract shall become due the payment of which the Principal...., and Suret.... bind themselves, their heirs, executors, administrators, successors, and assigns jointly and severally, firmly by these presents, as follows:

THE CONDITIONS OF THE OBLIGATIONS ARE SUCH THAT WHEREAS, the above bounden Principal... and said "Owner" have entered into a certain written Contract (hereinafter called the Contract") dated .... 19..... for the .....

.....

in accordance with the plans and specifications drawn by DALE H. REA, Consulting Engineer, (Hereinafter called the "Engineer") a copy of which Contract is by reference made a part hereof, said work to be done according to the

NOW, THEREFORE, if the above bounden Principal.... shall at all times duly, promptly and faithfully perform all the terms and conditions of said Contract or his or its sub-contractor or subcontractors shall duly and promptly pay for any and all labor, materials, team hire, sustenance, provisions, provender and other supplies that have been or shall be used or consumed by such Principal.... or his or its sub-contractors in the performance of the work in said Contract contracted to be done, and hereby stipulates and agrees and waives notice thereof, that no change, extension of time, alteration in or addition to the terms of the Contract or the work to be performed thereunder, or the specifications accompanying the same and no forbearance on the part of either the Owner or said Principal.... to the other, shall in any wise effect its obligation on this Bond; or release the Principal.... and the suret..., and if the said Principal... shall duly and promptly pay all sub-contractors for any and all materials and labor that have been or shall be furnished and performed or used in connection with the performance of said Contract and shall also indemnify and [fol. 131] save harmless the said Owner to the extent of any and all payments in connection with the carrying out of said Contract which said Owner may be required to make under the law by reason of any such failure or default by the said Principal.... and any such sub-contractor, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF, the above named Principal.... and suret.... have executed this instrument this ..... day of ..... 19...., in four counterparts.

.....
(Contractor)

.....
(Street Address)

.....
(City and State)

ATTEST:

..... By .....

.....

(Surety)

.....

(Street Address)

.....

(City and State)

ATTEST:

.....

By .....

(Attorney in Fact)

(The use of other than this form is not acceptable)

[fol. 132]

CONTRACT

THIS CONTRACT, Made and entered into this ..... day of ....., 19....., by and between the ....., party of the first part, hereinafter in the Contract Documents called the "Owner", and .....

.....

(1) A corporation organized and existing under the laws of the State of .....

(2) A partnership consisting of .....

.....

(3) An individual trading as .....

....., of the City and State of ..... hereinafter in the Contract Documents called the "Contractor", party of the second part.

WITNESSETH: That the Owner and the Contractor for the considerations hereinafter named, mutually agree as follows:

ARTICLE 1

STATEMENT OF WORK: For and in consideration of the unit and/or lump sum prices for the various items of work as set forth in the bid and Proposal heretofore submitted by the Contractor, said Contractor shall furnish all necessary business administration, superintendence, labor, equipment and material, and perform complete, and deliver to the Owner, to the Owner's satisfaction, under the direction of the Engineer, free from all liens, claims and demands of any kind for material, equipment, supplies, services, labor, taxes and damage to property or persons, in full compliance with the Contract Documents and in strict accordance with the terms thereof, all of which are made a part hereof by reference herein, and are designated as follows: (a) Notice to Bidders (b) Instructions to Bidders (c) Bid Bond Form (d) Performance Bond Form (e) Contract (f) Notice of Award (g) Notice to Proceed (h) Proposal (i) Drawings (j) Specifications (k) Addenda (See Proposal).

The above named documents shall be binding and effective and form a part hereof as if attached hereto or fully set out herein, and each detail shall be equally binding whether it appears in one, some or all of the Contract Documents.

[fol. 135] ARTICLE 2

PERFORMANCE BOND: The party of the second part furnishes concurrently herewith a Performance Bond in the amount of the total Contract price, as required by the Contract Documents, such Bond being attached hereto. The Performance Bond shall guarantee all material and workmanship furnished by the Contractor for a period of one year after completion of the work called for by this Contract.

ARTICLE 3

TIME OF COMPLETION: The Contractor shall proceed with due diligence and care and shall maintain the necessary men, plant and equipment on the job to complete the work on time. Construction of the entire project shall be com-

pleted in accordance with the Contract Documents and ready for use within ..... calendar days from the date of the notice to proceed, and a penalty of ..... ($.....) Dollars per day will be deducted from the amount due the Contractor for the performance of the Contract for each day thereafter which is required to complete the work [redacted] for by the Contract. Extension of the completion date will be allowed only in accordance with provisions of the Contract.

ARTICLE 4

COST OF CONSTRUCTION: The Contractor agrees to complete the work shown and described in the Contract Documents for the sum of .....

.....

Dollars ($.....). Payment of this sum shall be made by the Owner to the Contractor in accordance with other provisions to be found in the Contract Documents.

IN WITNESS WHEREOF, the parties hereto have executed this Contract in four counterparts, as of this day and year hereinabove set forth.

(SEAL) .....

ATTEST: Owner

By ..... By .....

Title ..... Title .....

(SEAL) .....

ATTEST: Contractor

By ..... By .....

Title ..... Title .....

[fol. 134]

NOTICE TO PROCEED

....., Colorado

.....

(Date)

TO: .....

.....

.....

You are hereby authorized to proceed on this date, ... 19....., or within ten (10) consecutive calendar days hereafter with the work covered by the Contract Documents titled and numbered .....

.....

.....

BY .....

TITLE .....

ATTEST:

BY .....

TITLE .....

[fol. 135]

ADVERTISEMENT AND FINAL ACCEPTANCE FORM
(In Duplicate)

.....

Date

TO: .....

.....

.....

You are hereby notified that the following advertisement for final payment appeared in a local newspaper dated ..... 19....

"After thirty (30) days from ..... 19.... ..... "Owner" will pay to ..... "Contractor" the full balance due on the project .... covered by Specifications No. ..... All persons having claims for labor, rentals, services, or materials furnished under this Contract, who shall not have been paid therefore, shall present the same to the Owner in writing and verified prior to date specified above, or the Owner shall be free of all liabilities for attempting to obtain payment to such persons by the Contractor."

Subject to the terms of the Contract Documents a final payment check is attached hereto in the amount of .... ($ .....).

Failure to sign, approve and return one copy of this form, or protest, within ten (10) days constitutes proof of approval and acceptance by the Contractor of the final amount due under the Contract.

.....

Owner

By .....

The final amount paid and the terms and conditions set forth herein and in the Contract Documents are approved and accepted.

.....

Contractor

By .....

PROPOSAL FORM

TO: PLATTE CANYON WATER AND SANITATION DISTRICT
LITTLETON, COLORADO

The undersigned hereby proposes and agrees that he will enter in and perform the Contract attached hereto, of which this proposal forms a part, and will do the construction therein described on the terms and conditions therein set forth, and furnish all the labor, materials, tools, equipment, transportation and services for said construction in strict conformity with the Drawings and Specifications and all the Contract Documents, and any Addendum to any part thereof which the undersigned proposes to execute at the price set opposite each item.

SCHEDULE I

Item	Work or Material	Quantity	Amount
1.	Install 18" OD Welded Steel Pipe Including Fittings, complete in place	5,276 L.F. @ _____ (words) _____ ($_____) per L.F.	$_____
2.	Extra Compensation for Connecting 18" Steel pipe to existing 18" Tee at Sta. 0+00	For the Lump Sum of _____ (words) _____ ($_____)	$_____
3.	Extra Compensation for additional cost of constructing line across Ken Caryl Road as shown on plans and called for in the specifications.	For the Lump Sum of _____ (words) _____ _____ ($_____)	$_____
4.	Extra Compensation for additional cost of constructing 18" steel line through corrals, under bldgs. and through lawns and trees from Sta 47+26 to 52+76	For the Lump Sum of _____ (words) _____ _____ ($_____)	$_____
5.	Furnish and install 5' Brick Manhole for 4" air valve and 2" air release valve and appurtenances complete in place as shown on the plans and called for in the specifications.	2 Each @ _____ (words) _____ _____ ($_____) per ea.	$_____
6.	Furnish and install Blowoff structure and inspection manhole with appurtenances, complete in place as shown on the plans and called for in the specifications	1 Each @ _____ (words) _____ _____ ($_____) per ea.	$_____

PROPOSAL FORM (CONT.)
SCHEDULE NO. 1

7. Making field cuts on steel line as result of change in location or alinement of steel pipeline.

6 Each _____ (words)

_____

_____($_____) per ea._____

8. Extra compensation for additional cost of furnishing and installing 16" valves and boxes

2 Each _____ (words)

_____

_____($_____) per ea._____

9. Furnish and install 6" Flanged valve with 6" Insulkit and 6 blind flange assembly complete in place as shown on the drawings and called for in the specifications.

12 Each _____ (words)

_____

_____($_____) per ea._____

10. Furnish and install 8" flanged valve with 8" Insulkit and 8" blind flange assembly complete in place as shown on the drawings and called for in the specifications.

7 Each _____ (words)

_____

_____($_____) per ea. _____

TOTAL FOR SCHEDULE NO. 1 _____

The undersigned hereby proposes and agrees that he will complete all of the above described work in Schedule No. 1 complete in place and ready for operation within _____ calendar days from Notice to Proceed.

_____

SCHEDULE II

Item	Work or Material	Quantity	Amount
1.	Install 16" OD welded steel pipe including fittings, complete in place	5368 L.F. @ _____ (words) _____ _____ ($_____)	$_____
2.	Extra compensation for additional cost of constructing line across Coal Mine Road as shown on the plans and called for in the specifications.	For the Lump Sum of $_____ (words) _____ _____ ($_____)	$_____
3.	Extra compensation for additional cost of constructing line in Bowls Ave., as shown on the plans and called for in the specifications.	For the Lump Sum of $_____ (words) _____ _____ ($_____)	$_____
4.	Furnish and install 5' Brick Manhole for 4" air valve and 2" air release valve and appurtenances, complete in place as shown on the plans and called for in the specifications	2 Each _____ (words) _____ _____ ($_____)	per ea.$_____
5.	Furnish and install Blow off structure with 6" Blow off and inspection manhole and appurtenances, complete in place as shown on the plans and called for in the specifications	For the Lump Sum of $ _____ (words) _____ _____ ($_____)	r$_____
6.	Furnish and install 6" flanged valves with 6" insulkit and 6" Blind flange, assembly complete in place as shown on the plans and called for in the specifications	7 @ $_____ (words) _____ _____ ($_____)	$_____

PROPOSAL FORM
SCHEDULE NO. 11 (CONT.)

7. Furnish and install 12" flanged valves with 12" insulkit and 12" Blind flange assembly, complete in place as shown on the plans and called for in the specifications

2 Each @ $ _____
(words)
_____
_____($_____) per ea. $_____

8. Extra compensation for additional cost of furnishing and installing 16" valve and box

1 Each @ $ _____
(words)
_____
_____($_____) $_____

TOTAL FOR SCHEDULE 11 $_____

The undersigned hereby proposes and agrees that he will complete all of the above described work in Schedule No. 2 complete in place and ready for operation, within _____ calendar days from date of Notice to Proceed.

_____

PROPOSAL FORM
SCHEDULES III, IV AND V. (CONT.

SCHEDULE III

Item	Work or Materials	Quantity	Amount
1.	Furnish and install 12" Class 150 Colo. T.J. Pipe, including all fittings, valves, valve boxes, excavation, testing, backfilling and all other incidental work, complete in place and ready for operation as shown on the plans and called for in the specifications	3131 L.F. @ $_____ (words) _____ _____ (\$_____) per L.F.	$_____

SCHEDULE IV

1.	Furnish and install 12" Class 150 C.I., T.J. pipe, including all fittings, valves, valve boxes, excavation, testing, backfilling and all other incidental work, complete in place and ready for operation as shown on the plans and called for in the specifications	3561 L.F. @ $_____ (words) _____ _____ (\$_____) per L.F.	$_____

SCHEDULE V

1.	Furnish and install 8" Class 150 C.I., T.J. Pipe, including all fittings, valves, valve boxes excavation, testing, backfilling and all other incidental work, complete in place and ready for operation as shown on the plans and called for in the specifications	1,855 L.F. @ $_____ (words) _____ _____ (\$_____) per L.F.	$_____

The undersigned hereby proposes and agrees that he will complete all of the above described work in Schedules No. 3, 4 and 5 complete in place and ready for operation within _____ calendar days from date of Notice to Proceed.

The Owner reserves the right to delete all or any of Schedules No. 3, 4 and 5 and award Schedules No. 1 and 2 as the best interests of the Owner may be served.

_____

The undersigned has examined and is familiar with the Drawings and Specifications and all Contract Documents related thereto, and has included in his bid a sum to cover the cost of all items necessary to complete the Contract. The making of a bid creates a conclusive presumption that all things and actions required by this Proposal have been done by the Contractor and constitutes a declaration by the Contractor to that effect. The undersigned certifies further that he has the technical ability and experience to perform the work at the total price set forth in this proposal.

The undersigned agrees to submit, if requested, a statement of facts in detail as to his financial condition, technical ability and experience.

The undersigned has checked carefully all submitted figures and understands that the Owner will not be responsible for any errors or omissions on the part of the undersigned in making his bid, or in his failing to obtain before bid a proper interpretation from the Engineer of any inconsistencies or ambiguities in plans and specifications or the Contract Documents.

Enclosed find a certified check, drawn on a bank which is a member of the Federal Reserve System, in the sum of _____ _____, made payable to the Owner, or a Bidder's Bond of like amount, and executed by an approved surety company. Said check or bond is given as a guarantee that the Bidder will enter into the Contract and Performance Bond on the forms attached hereto, if awarded the work, and the amount thereof represents the agreed liquidated damages that the Owner will sustain if the Bidder fails or refuses, for a period of ten (10) days after Notice of Award, to enter into said Contract, in which event said check or bond shall be immediately paid to, and retained by, the Owner as payment of said liquidated damages and not as penalty.

Unless otherwise required by law, the undersigned agrees that the Owner has the right to hold all bids received for a period of thirty (30) days after date of opening thereof.

The following addenda have been received, signed, and are hereby attached:

_____

_____

_____
(Name)

By _____

Title _____

Address _____

Telephone _____

Dated this _____ day of _____ 19____.

[fol. 142]

GENERAL CONDITIONS

101. DRAWINGS AND SPECIFICATIONS: The engineer will furnish to the Contractor, free of charge, copies of all drawings and specifications reasonably necessary for the execution of the work. They are the property of the Engineer and are to be returned to him, upon request, at the completion of the work. In case of any discrepancy in the Contract Documents, Special Provisions shall govern over both Specifications and Drawings. Specifications shall govern over Drawings, and computed or written dimensions shall govern over scaled dimensions. In the event of discovery of discrepancies or any type of error whatsoever in the specifications, plans and drawings, the Contractor shall not adjust them, save at his own risk and expense, but shall immediately request in writing, and the Engineer shall give in writing, an interpretation of the intent of the Contract, which interpretation shall govern. The Contractor shall furnish from time to time such detailed drawings and other information as he may consider necessary.

102. INSPECTION: The Consulting Engineer of the Owner, or his duly authorized inspectors, will supervise the construction of all work covered by this Contract. He shall be authorized to determine the amount or quantities of the several items of work which are to be paid for under this Contract; to order changes within the scope of the Contract, and to render decisions on any questions which may arise relative to the execution of the Contract. The Engineer's inspectors shall not have authority to order changes in the work or render decisions involving the interpretations of the design specifications or drawings which require the experience and judgment of the Engineer, nor to revoke, alter, or waive any requirements of the Contract or Specifications. He shall have authority to call to the attention of the Contractor any failure of any of the work or material to conform to the Specifications and Contract. He shall have authority to reject materials or suspend the work, wholly or in part, until every question at issue can be referred to the Engineer. The Contractor shall comply with the instructions of the Inspector when such instructions are consistent with the obligations

of this Contract, or he shall immediately appeal to the Engineer for his decisions, and shall respect such decisions when so rendered. No work shall be done, nor materials used, without suitable supervision and inspection by the Engineer, or his duly authorized representative. The Contractor shall not suspend any portion of the work nor resume suspended work without the written authority of the Engineer. No extension of time of completion of the work will be granted because of delays caused by suspension hereunder. Neither the inspection by the Engineer or his authorized representative, nor any order or certificate by the Owner or the Engineer, nor any order by the Owner for the payment of money, nor any payment for, or acceptance of, any work by the Owner nor the extension of time, shall operate as a waiver of any provisions of the Contract, or of any power reserved herein to the Owner, or any right to damage herein provided; nor shall any waiver of any breach of the Contract he held to be a waiver of any other or subsequent breach.

All material and workmanship (if not otherwise provided by the specifications) shall be subject to inspection, examination and test by the Owners Inspectors at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction is carried on. The Owner shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily [fol. 143] corrected, at the Contractor's expense and the Contractor shall promptly segregate and remove such rejected material from the premises, also at the Contractor's expense.

The Contractor shall furnish promptly and without additional charge all reasonable facilities, labor, and material necessary for proper and convenient inspection and for any test that may be required by the inspectors. All inspection and test by the Owner shall be performed in such a manner as not to delay the work unnecessarily. Special, full size, and performance tests shall be as set forth in the specifications. If at any time inspection be delayed by reason of the failure of the Contractor to have the material

and workmanship ready for such inspection, the Contractor shall be charged with any additional cost of inspection resultant from such delay.

Should it be considered necessary or advisable by the Owner at any time before final acceptance of the entire work to make examinations of completed work, by removing or tearing out of any part of parts of the same, the Contractor shall, on request, promptly furnish all necessary facilities, labor, or material to accomplish such inspection. If any such work is found to be defective in any material respect, due to fault of the Contractor or his sub-Contractors, he shall defray all expense of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the Contract, the actual cost of labor or material necessarily involved in the examination and replacement, plus fifteen (15%) percent will be allowed the Contractor and he will, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

The source of supply of each of the materials shall be approved by the Engineer before delivery is started. Only materials conforming to the requirements of these specifications and approved by the Engineer shall be used in the work. All material proposed to be used may be tested at any time during their preparation for use. If, after trial, it is found that sources of supply which have been approved do not furnish a uniform product, or if the products from any source prove unacceptable at any time, the Contractor shall furnish approved materials from another approved source. No material, which after approval has in any way become unfit for use, shall be used in the work. The Contractor shall notify the Engineer in writing a sufficient time in advance of the manufacture or production of materials to be supplied by him under this contract, to enable the Engineer to arrange for mill and factory inspection and testing of same if desired. The failure of the Engineer to require mill inspection will not relieve the Contractor from responsibility for any defect or damage resultant from use of such materials. No materials shipped by the Contractor from the factory prior to having satis-

factorily passed upon such testing and inspection by the Engineer's representative, or prior to the receipt of notice from said Engineer that such testing and inspection will not be required, shall be incorporated in the work. The Contractor, at his expense, shall furnish to the Engineer six certified copies of all required factory and mill test reports.

Inspection of the work by the Engineer or his authorized inspector will be done whenever the Contractor is performing work that requires inspection as determined by the Engineer. The normal working time shall be during a regular 5 day, 40 hour work week, Monday thru Friday. If the Contractor elects to work more than 40 hours per week and inspection is required during this overtime work as determined by the Engineer, the Engineer shall be paid by the Contractor at the rate as specified herein for all inspection time required over the normal 5 day, 40 hour work week. If the Engineer or his authorized representa- [fol. 144] tive is called to the job site to straighten out problems created by the Contractor he will be paid at the same rate as for overtime inspection as stated above.

* * * * * * * *

[fol. 145]

EARTHWORK FOR PIPELINES

401. SCOPE AND PAYMENT: The work to be done under this section consists of furnishing all labor, materials, equipment, and performing all operations in connection with the excavation, backfill, compacting backfill, bracing, sheeting, shoring, and grading, for all pipelines shown on the drawings or called for in the specifications. Material to be excavated will not be classified. All excavations in rock, shale, boulders, frozen ground or in ground water will be included for payment in the unit or lump sum bid price in the proposal for excavation and backfill, with no extra payment in event these conditions are encountered.

402. EXCAVATION: All trench excavation required for the construction of pipelines to be installed under this contract shall be made by open-cut and shall be of sufficient width to provide ample room for workmen engaged

in handling pipe and making joints. This width shall in no case be less than 12-inches greater than the external diameter of the pipe. Bottoms of trenches shall be accurately graded to provide uniform continuous pipe bearing and support. Supporting the pipe on blocks, either temporary or otherwise will not be permitted, and stones and jutting rock in the trench bottom or side walls that could injure the pipe shall be removed. For all trench excavation the Contractor shall provide suitable equipment with which to remove water promptly from the excavation, and he shall keep the trench dry during the progress of the pipe installation. No trench shall be backfilled until the line has been tested and/or approved by the Engineer. The length of trench that shall be permitted to be open at any one time will be decided by the Engineer on the basis of public safety and convenience. The depth of trench shall be as shown on the plans and staked by the Engineer. Depth of trench for water pipe shall be such as will permit the pipe to be laid with a minimum 4½ foot cover to official grade. The depth for water pipe may be increased or decreased in order to make connections to existing water lines and at stream crossings to secure smooth profiles and to pass obstructions; but such variations will be prescribed in all cases by the Engineer. When rock is encountered in the trenching operations it shall be removed to an elevation not less than six (6) inches below the normal subgrade of the trench. The excavation in rock that is carried below the normal subgrade of the trench shall be refilled with selected fine material to provide a bedding for the pipe. When selected fine material is not available sand shall be provided in place thereof. This bedding material shall be sufficiently damp to properly compact and shape to the desired section, and shall provide bearing for the bottom quadrant of the pipe circumference. This Contract is based upon the assumption that any kind of soil may be encountered in excavation and the Contractor shall acquire such information as may be necessary, including test borings to determine the character of the subsoil. The Contractor shall do any jackhammer or blasting necessary for removal of rock.

403. BACKFILL: After satisfactory testing of the pipeline or as directed by the Engineer, the trench shall be backfilled using soft, unfrozen earth, free from rocks and lumps of paving. All trenches must be puddled. In backfilling, rocks or stones are not to be permitted closer to the pipe than six inches and every precaution is to be taken to prevent injury to the pipe or its coating. The backfill up to six inches above the top of the pipe shall be carefully placed and consolidated around and under the pipe haunches to give the pipe full support throughout its length. After [fol. 146] permission to continue backfilling has been given by the Engineer the trench may be filled to within one foot of the top of the trench with suitable material, and consolidated by wetting with water, using a rigid pipe or nozzle of sufficient length to reach within one foot of the top of the pipe. Care should be taken to use only sufficient water at each jetting point to insure permeation of backfill and proper consolidation and not result in surface saturation. Jetting pipe of nozzle shall be inserted in backfill at sufficiently close intervals along trench to be certain that uniform consolidation will result. When jetting is completed and surface is dry enough to be stable the balance of the trench shall be filled with moist materials and rounded over the cross section of the trench. This remaining fill shall be consolidated in the same manner as was specified by the Engineer and when completed the backfill shall be only slightly higher than the adjacent ground. Throughout the life of the Contract and for one year after completion of construction the Contractor shall maintain all backfill in a safe condition. When he is notified by the Engineer that any backfill is hazardous he shall correct such hazardous conditions at once. No separate payment shall be made for backfill of the pipelines and all costs in connection therewith including furnishing water for puddling shall be included in the unit or lump sum price bid in the Proposal for excavation and backfill for pipeline.

404. CUTTING AND REPLACING ROAD SURFACING: Unless otherwise specified all road, street and alley surfaces shall be cut and replaced by the Contractor as required by the City, County or State that has jurisdiction

over the road, street or alley. The permit for cutting and replacing the surface shall be obtained by the Contractor and any special compaction required for the pipeline before replacement of the road surface shall be performed by the Contractor as required by the permit. Separate payment shall be made for cutting and replacing road surfaces and all cost in connection therewith shall be included in the unit or lump sum price bid in the Proposal for the item in the Proposal.

405. BLASTING: When necessary, explosives in sufficient quantity to avoid delays to the work, shall be kept on hand by the Contractor. Such explosives shall be stored, handled and used as prescribed by the law and the lawful regulations of administrative agencies of the State of Colorado. The Contractor shall take full precautions for the safety of the work and workmen. The Contractor shall be responsible for all damage caused by blasting and shall take extra precautions when required by the Engineer. Whenever in the opinion of the Engineer blasting is liable to injure existing structures the Contractor shall cease blasting and continue to excavate by other approved methods. No separate payment shall be made for blasting and all cost in connection therewith shall be included in the unit or lump sum price bid in the Proposal for excavation and backfill for the pipeline.

* * * * * * *

[fol. 147]

INSTALLATION OF WATER PIPELINES

601. GENERAL: The Contractor shall perform all operations required for installing water pipelines as shown on the drawings and as specified herein. Unless otherwise specifically stated in the special conditions, payment for installing the pipelines shall be based on the actual number of linear feet of pipe laid in accordance with the plans and specifications. No deductions in length will be made for fittings, valves or specials installed in the line, but valves or blind flanges installed on tees or crosses and other fittings for future extensions and at structures will not be measured for payment. The unit price or lump sum price

bid in the proposal shall include the cost of hauling, handling, laying and jointing pipe, fittings, hydrants, valves, valve boxes, providing kick blocks, cutting, bonding, testing and chlorination of pipe, trench excavation, backfill, cutting pavement, replacement of road and street surfacing, making tie-ins and all appurtenant work required to construct the pipeline complete in place and ready for operation, all in accordance with the Plans and Specifications. Cutting and replacing of pavement is not included in the cost of installing the pipelines when there is a special bid item therefor in the proposal. Approved type concrete kickblocks shall be provided at all bends, fire hydrants, tees, plugs, blind flanges and at all points of unbalanced hydraulic force. During the course of the installation of the pipeline at least one way traffic shall be maintained at all times.

602. HANDLING OF PIPE: All pipe and fittings will be handled with care to prevent damage. The contractor shall inspect the condition of the pipe as it is unloaded and will assume responsibility and replace any damaged material discovered after the material is unloaded to the completion of the Contract. Steel pipe and fittings protected with special coatings shall be protected from damage due to impact, contact with sharp projections or other objects which may penetrate the coating, at all times during the progress of the installation. All steel pipe shall be stored upon raised supports furnished by the contractor placed at the unprotected ends of the pipe. All protected steel pipe shall be handled by means of fiber slings so designed as to prevent damage to the protective coating. All steel pipe and fittings, before installation, shall be inspected for damage to the protective coating, and any damages will be repaired. Before installation of any pipe all dirt debrie and foreign material shall be removed from the inside of the pipe.

603. STEEL PIPE INSTALLATION: The pipe shall not be dropped or subjected to any rough treatment that might distort the pipe or injure the protective coating. Any unit of pipe, that in the opinion of the Engineer is damaged beyond repair, by the contractor, shall be re-

moved from the work and replaced at the expense of the contractor with an acceptable unit. The steel pipe, adaptors, specials and other related items shall be accurately laid to the lines and grades shown on the drawings or established by the Engineer. Bell holes shall be excavated at the joints to provide ample room for making satisfactory connections. (Minimum of 8-inches all around). No tools or equipment or methods of handling of pipe employed in the installation of the pipe shall be used if they tend to damage the pipe or pipe covering. The underside of each section of pipe shall undergo rigid inspection before placing the section in its final position. All methods of pipe installation adopted by the contractor shall be subject to the approval of the Engineer. Each section of pipe shall be firmly bedded in the trench bottom before jointing operations begin. Where the pipeline is to be placed in rock, no section of pipe shall be placed unless and until the sand cushion or other suitable cushion material has been placed. Backfilling at the joints of the completed portions of the pipe shall not be done until the pipe installation has been tested and approved by the Engineer. To connect specific fittings at exact location, some field cutting of the pipe will, [fol. 148] be necessary. All cutting will be done with care and just enough of the protective covering removed to allow for the making of the dresser type coupling joints. After the pipe is cut and the protective covering removed the cut ends and any damaged lining shall be cleaned, primed and painted with hot coal tar enamel.

604. STEEL PIPE JOINTS: The jointing of the steel pipe will normally be made with sleeve type flexible couplings, as shown on the drawings or as specified in the special conditions. The sleeve-type joints shall consist of a sleeve with followers, gaskets, and bolts and shall be so designed and constructed as to provide, when assembled, a tight flexible joint under all reasonable conditions such as expansion and contraction, settling of the pipe, slight movement of the ground, traffic vibrations and other similar conditions. Couplings shall be Dresser or equal. Where the plans or specifications call for special connections between the steel pipe and other kinds of piping, the con-

tractor shall make all the joints as required. Pipe or specials fitted with heads for bell and spigot joints shall be connected to the bells by means of jute and caulked virgin lead joints. The contractor shall furnish the jute and virgin lead for all joints. Before entering the spigot into the bell both members shall be free from objectionable material. The leaded joint shall be made in the manner used on cast iron bell and spigot joints. All joints specified in this paragraph shall remain uncovered until specified tests of the complete pipeline have been satisfactorily completed and approved by the Engineer. The protection of the dresser type couplings shall be made with hot coal tar enamel and the following procedure shall be followed.

1. After the dresser coupling is in place, nuts tightened etc., the nuts should be checked to be sure all are tight. The Contractor shall use a torque wrench to be sure that all bolts are tightened correctly.

2. The thermite bonds shall be installed next—the instructions included with the bonding kits shall be followed.

3. The dresser coupling and exposed uncoated portion of the pipe shall be cleaned and primed with coal tar primer. After priming at least eight hours shall be allowed before continuing with the pouring of the joint. The primer should be applied with a spray for best results. In lieu of priming the coupling after installation, the couplings may be primed before installation. After installation the portion of the coupling not primed or which has the primer damaged, shall be spot primed as required. After priming a minimum of eight hours and a maximum of seventy-two hours shall be allowed before pouring the coal tar enamel. The spot priming of the joint shall be allowed a minimum of four hours to dry and final pouring of the joint will not be done until the primer is dry.

4. The primed pipe on both sides of the dresser shall be painted with hot coal tar enamel to the follower ring; also the outside edge of the follower shall be painted.

5. Fiber Glass Cloth shall then be wrapped around the coupling and taped in position so as to totally enclose the joint.

6. Backfill shall then be loosely tamped to the extent and amount as directed by the Engineer around the pipe and coupling to the spring line.

7. The hot coal tar enamel shall then be poured into the middle ring and outside of the follower rings, through a slit in the top of the wrapper. The pouring shall be made continuously on each side of the pipe [fol. 149] to insure that the bottom half of the coupling assembly is completely protected. The pouring may be stopped when the joint is filled to approximately the spring line if the pressure causes a loss of enamel through the fiberglass wrapper. After the first pour has set sufficiently the pouring shall be continued until the joint is completely enclosed with the enamel. The hot coal tar enamel shall be poured at a temperature between 475° F to 500° F and the Contractor shall have a thermometer for use of the inspector in checking the temperature. Any coked or burned enamel shall be discarded.

8. The manufacturer will furnish an electrostatical testing machine to check for holidays on pipe and joints if this is felt necessary by the Engineer.

9. The inspector may, at his discretion, uncover some of the joints to check and see if the bottom half of the joint is completely enclosed. If it is found that voids exist the joint material will be removed and the joint re-poured. Repeated bad joints will result in the contractor being required to uncover all joints at his own expense for visual inspection.

605. CAST IRON PIPE INSTALLATION: All pipe and accessories shall be handled in such a manner as to insure delivery of the work in sound, undamaged condition. Any damage to or loss of materials furnished to the Contractor by the Owner shall be replaced by the Contractor at his own expense. Cutting of pipe shall be done in a neat

and workmanlike manner without damage to the pipe. Wheel cutters shall be used where practicable. While suspended in the sling and before lowering into the trench the pipe shall be inspected for defects by tapping with a light hammer to detect cracks. Defective or unsound material shall not be installed in the line. Installation of defective materials regardless of the cause of the defect shall be removed at the Contractor's expense. In general, grade and alinement of the pipe shall be even and uniform. In laying bell and spigot pipe the packing material for the joint shall be held around the bottom of the spigot so that the packing will enter the bell as the pipe is pushed into position. The spigot shall be centered in the bell and the pipe pushed into position and brought to the required alignment. Bells shall in general face in the direction of laying and no less than two lengths of pipe shall be in position before the joint is poured. Lumps, blisters, excess coating, oil and grease shall be removed from the pipe joint. Packing shall be carefully placed and tightly caulked to a uniform thickness. No loose or frayed ends of fiber shall protrude into the space to be filled with joint filler. Each joint shall be carefully inspected and checked for proper depth before the joint runner is attached. The depth of lead shall be not less than 2¼ inches back of the face of the bell. Lead shall be heated in a melting pot kept near the joint to be poured, brought to proper temperature so that when stirred the surface will show a rapid change in color, and when poured into the joint space will insure a perfect joint. Before pouring lead, all scum shall be removed. The joint runner shall fit snugly against the face of the bell and the outside of the pipe and shall be dammed with clay at the pouring gate to assure filling the joint even with the top of the bell. Each joint shall be made with one pour completely filling the joint space. The caulking shall be done by competent mechanics in such a manner as to secure tight joints without over straining the bells. The caulking shall progress toward the joint gate. If the packing has been insufficiently caulked, permitting the lead to be driven during caulking to a depth of more than 1/4-inch from the face of the bell at any point, the lead shall be removed and the joint remade. In placing mechanical joint pipe the spigot

should be centrally located in the bell and adequate anchorage shall be provided where abrupt changes in direction and dead ends occur. Joints should be free from rust and all forcing materials and soapy water should be used to [fol. 150] remove grease and oil from the pipe joint and rubber gasket when directed by the Engineer. The following normal range of bolt torque is recommended:

Bolt Diameter	Torque Feet Pounds	Recommended Length of Wrench.
⅝"	40-60	8"
¾"	60-90	10"
1"	70-100	12"
1¼"	90-120	14"

When tightening bolts, it is essential that the gland be brought up toward the pipe flange evenly, maintaining approximately the same distance between the gland and the face of the flange at all points around the socket. This may be done by partially tightening the bottom bolt first, then the top bolt, next the bolt at either side, and last the remaining bolts. Repeat the cycle until the bolts are within the above range of torque. If the effective sealing is not obtained at the maximum torque indicated above, the joint shall be disassembled and reassembled after thoroughly cleaning. Overstressing of bolts to compensate for poor installation practice is to be avoided. Special type joints shall be installed according to the manufacturers recommendations and subject to the Engineers approval.

606. CEMENT ASBESTOS PIPE, PLASTIC PIPE AND OTHER MISCELLANEOUS PIPE, INSTALLATION: Cement Asbestos Pipe, plastic pipe and other miscellaneous pipe installations shall be installed as recommended by the pipe manufacturer, as approved by the Engineer, as shown on the drawings, and as covered by these general specifications and as specified in the special specifications.

607. SETTING HYDRANTS, VALVES AND VALVE BOXES: Hydrants, valves and valve boxes shall be installed in the lines as shown on the drawings and as directed by the Engineer. Hydrants, valves and valve boxes shall

be set plumb, centered, with valve boxes placed directly over the valves. Hydrants shall remain plumb during the year guarantee of the workmanship. Earth fill shall be carefully tapped around the valve box to a distance of four feet on all sides of the box. Hydrants shall be set at such elevations that the connecting piping will have the same depth of cover as the distribution mains. The hydrants shall be set upon a slab of stone or concrete not less than 4-inches thick and 15-inches square. The back of the hydrants opposite the pipe connection shall be firmly wedged against the vertical face of the trench with a concrete kickblock at least equal in size to that on which the hydrant rests to prevent the hydrant from blowing off the line. The Tee on the main line opposite the fire hydrant shall also be kickblocked. Not less than 7 cubic feet of broken stone shall be placed around the base of the hydrants to insure drainage. The backfill around hydrants shall be thoroughly compacted to the grade line in a manner satisfactory to the Engineer. Hydrants and valves shall have the interior cleaned of all foreign matter before installation. Stuffing boxes shall be tightened and the hydrant or valve shall be inspected in open and closed positions to see that all parts are in working condition. No separate payment shall be made for installation of valves, valve boxes and hydrants and all costs in connection therewith shall be included in the unit or lump sum price bid in the proposal for the items in which the work occurs.

608. TESTS: Before backfilling all pipelines shall be tested by the contractor with water, air, or a combination of air and water as approved by the Engineer. Any and all defects found shall promptly be fixed. Backfilling of any section will not be allowed until after testing is complete to the satisfaction of the Engineer. Test pressures of 100 pounds per square inch maintained for four hours with less than 5 pounds per square inch pressure drop shall be [fol. 151] acceptable unless otherwise stated in the special specifications. This test pressure does not relieve the contractor of the responsibility of repairing any future leaks resulting from pressures for which the pipeline was designed for a period of one year. No separate payment shall

be allowed for testing of the pipeline, but all costs in connection therewith shall be included in the lump sum or unit price bid in the proposal for the items in which the work occurs.

609. STERILIZATION: After completion of the pipeline it shall be disinfected with chlorine before acceptance for use. Liquid hypochlorite or calcium hypochlorite shall be used. The amount of chlorine applied shall be such as to provide a dosage of not less than 50 parts per million. The chlorinating material shall be introduced to the water line in a manner approved by the Engineer. After a contact period of not less than 8 hours, the system shall be flushed with clean water until the residual chlorine content is not greater than 0.2 parts per million. All valves in the lines being disinfected shall be open and closed several times during the contact period. Sterilization shall be done according to the requirements of the State Health Department. No separate payment shall be allowed for the sterilizing of the pipeline but all costs in connection therewith shall be included in the unit price or lump sum bid in the proposal for the items in which the work occurs.

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[fol. 152]

SPECIAL SPECIFICATIONS

A—SPECIAL CONDITIONS

A01. THE REQUIREMENTS: It is required that there be constructed and completed in accordance with these specifications and drawings listed herein and bound herewith a steel water transmission conduit and appurtenant structures and connections, all complete in place and ready for operation.

A02. LOCATION: The site of the work is west along the Jefferson and Arapahoe County line from Ken Caryl Road to Bowles Avenue, with laterals on Coal Mine Road and Bowles Avenue. The pipeline will provide a water main for the Platte Canyon Water & Sanitation District. The specific location is shown on the drawings.

A03. DESCRIPTION: The water transmission conduit will be installed in dedicated streets and in easements provided by the District. The work will consist of trench excavation, laying and jointing of water lines, fittings, valves and valve boxes. The work will include tie-ins to the existing system and construction of pipeline structures which include blow-offs, valves and air valves. The connection to the existing system may or may not be included in this contract depending on the time of construction of the supply lines by Littleton. The two sources of water supply from Littleton are Sheridan and Ken Caryl Road and at the east end of 12" line on Bowles Avenue. The pipeline work shall start at Sheridan and Ken Caryl Road and proceed North. If water is not available for testing the pipe, air furnished by the Contractor shall be used.

A04. THE PROPOSAL: The proposal calls for unit price and lump sum bids for construction of the pipeline, structures and connecting piping. The bid items contemplate complete payment for the complete construction of the structures, pipelines and tie-ins, including, but not restricted to, preparation of structures site, excavation, backfill, compacting backfill, embankment, grading, street surface replacement, pipeline and connections, concrete, reinforcement steel, equipment, materials and all incidental work, except material to be furnished by the Owner. The intention of the proposal is to obtain from the Contractor the completed pipeline, ready for operation and fully acceptable to the Platte Canyon Water and Sanitation District and the City of Littleton, according to the plans and specifications. All items must be filled out and award of the Contract on the schedule will be made only to one bidder. The Owner reserves the right to delete any or all of Schedules No. 3, 4 and 5.

A05. GEOLOGICAL CONDITIONS: Bidders and the Contractor must assume all responsibility for deductions and conclusions which may be made as to the nature of the material to be excavated, the difficulties of making and maintaining the required excavations and of doing other work affected by the geology and physical conditions encountered at the site of the work.

A06. OVERTIME INSPECTION: All inspection required over the normal 5-day, 40-hour week shall be done at the Contractor's expense at $6.25 per hour or $50.00 per day.

A07. LIQUIDATED DAMAGES: The Contractor shall pay the Owner as fixed, agreed and liquidated damages, the sum of Fifty dollars ($50.00) per day for each calendar day's delay beyond the date fixed for completion as shown in the proposal.

[fol. 153] A08. MATERIALS: The District will furnish only the following materials:

1. All 18" and 16" O.D. Steel pipe for the transmission line.
2. All steel pipe fittings for the 18" and 16" transmission line.
3. All 18" and 16" Dresser couplings for the transmission line.
4. All "Protecto Wrap" coating for dresser couplings.
5. Thermite Bonds for bonding pipe across dressers and valves.

The Contractor shall furnish all other material required, including but not restricted to, the following items:

1. All 16" Hub end gate valves and jute and virgin lead for connections.
2. All 6" Flanged gate valves, with gaskets, bolts and nuts for connections.
3. All 8" Flanged gate valves, with gaskets, bolts and nuts for connections.
4. All 12" Flanged gate valves, with gaskets, bolts and nuts for connections.
5. All 6", 8" and 12" Insulkits.
6. All 6", 8" and 12" Blind Flanges.

7. Concrete Kick Blocks.

8. Brick, mortar, concrete and reinforcement steel manhole rings and covers and Ladder rungs for manhole and vault construction.

9. 4" Simplex Air Inlet valve and 2" air release valve assembly with vent piping and fittings.

10. 6" Blow off assembly with valves and fittings.

11. All 12" C.I. Pipe, fittings, valves and boxes in Schedule III.

12. All 12" C.I. Pipe, fittings, valves and boxes in Schedule IV.

13. All 8" C.I. Pipe, fittings, valves and boxes in Schedule V.

1. The 18" and 16" steel pipe will be delivered along the trench site by the supplier and unloaded by the Contractor. If the trench site is inaccessable to trucks at the time of delivery, then the material will be unloaded and stockpiled by the Contractor near the job site. Pipe, valves, and fittings shall not be strung along the pipeline in places where they will interfere with traffic in streets, alleys or driveways.

2. The steel fittings may either be delivered along the trench site or stockpiled in the yards provided by the Contractor, as required by the job conditions. The fittings will be unloaded by the Contractor.

3. The items of material and equipment will not be delivered before the Contract is let.

All material furnished by the District shall be unloaded by the Contractor. Delivery of the pipe and fittings will not start until after the notice to proceed has geen given. Deliveries will be made during the normal 5-day, 40 hour week, unless otherwise arranged by the Contractor between the Supplier and the Inspector. All materials furnished by the Owner will be inspected by the Engineer and Contractor as they are delivered to the job site. All unsuitable materials will be rejected and all materials ac-

cepted shall be signed for by the Contractor and the Contractor shall be responsible for said material throughout the life of this Contract. Any rehandling of materials due to necessary stockpiling of materials or unloaded in the [fol. 154] wrong place shall be done at the Contractor's expense. Enough "Protecto Wrap" coating material will be furnished by the District to make the required steel pipe joints, as determined by use on similar jobs, and the recommendations of the Supplier. The Contractor shall replace all such materials that are lost or wasted. The Contractor shall ascertain the delivery of the materials to be furnished by the District through Armco Co. and shall base his time of completion thereon. The District will not be responsible for delays caused by Amco's failure to meet promised delivery dates.

A09. THE DRAWINGS: Bound herewith and made a part of these specifications are the following drawings showing the detailed work to be accomplished:

DRAWING NUMBER	TITLE
19-201-1	Key Map
19-201-2	18" Steel Line From Stations 0+00 to 26+30 Schedule I
19-201-3	18" Steel Line From Stations 26+30 to 52+66 Schedule I
19-201-4	18" Steel Line From Stations 52+66 to 79+60 Schedule II
19-201-5	18" Steel Line From Stations 79+60 to 106+38 Schedule II
19-201-6	Details of Concrete Blow-off Vault
19-201-7	Details of Manhole with 4" Air Inlet and 2" Air Release Valve
19-201-8	Fittings For 18" and 16" Steel Lines, Schedules I and II
19-201-9	12" C.I.P. on Bowles Ave. East of Sheridan Schedule III
19-201-10	12" C.I.P. on Bowles Ave. West of Sheridan Schedule IV
19-201-11	8" C.I.P. on Coal Road, Schedule V

A10. LIST OF MATERIAL AND EQUIPMENT: The following list of equipment and material for the transmission conduits are to be furnished by the Contractor. This list was prepared by the Engineer for making his estimates of cost. Neither the Owner nor the Engineer will be responsible for any errors, omission, or amounts given in the list, and this list represents a minimum that must be furnished. The list is included in these specifications to indicate the scope of the work to the Contractor and he must prepare his own list on which to submit his own lump sums shown in the proposal. The material and equipment list also includes the type, size and other pertenent information regarding the specific materials and equipment required by the Owner. The materials and equipment shall be furnished as specified and in full confirmity with the applicable general specificaations.

SCHEDULES I & II

1. Station 0+50, 52+76, 105+83 (Quantities for each station)

1—16" A.W.W.A. hub end, class 150 gate valve and valve box with jute and virgin lead.

2—Station 5+90, 23+95, 53+81 (Quantities each station)

2—8" Flanged Class 150 A.W.W.A. nut operated IBBM double disk, gate valves, with gaskets bolts and nuts.
2—8" Insulkits consisting of gaskets, sleeves and washers
2—8" Blind Flanges
2—8" C.I. valve boxes

[fol. 155]

3. 14+90. 44+49, 72+96, 79+71, 86+31, 93+04 99+63 (Quantities each station)

1—6" Flanged Class 150 A.W.W.A. Nut operated IBBM double disk, gate valve with gaskets, bolts and nuts.

1—6″ Blind Flange
1—6″ C.I. Valve Box
1—6″ Insulkit, consisting of gaskets, sleeves and washers.

4. 27+96, 31+16, 34″36, 37+56, 40+84, 62+74 (Quantities for each station)

2—6″ Flanged Class 150 A.W.W.A. Nut operated double disk, gate valve with gaskets, bolts and nuts.
2—6″ Blind flanges
2—6″ C.I. Valve Box
2—6″ Insulkits, consisting of gaskets, sleeves and washers.

5. 44+49 (Quantities each station)

1—8″ Flanged Class 150 A.W.W.A. Nut operated IBBM double disk gate valve with gaskets, bolts and nuts.
1—8″ Blind Flange
1—8″ C.I. Valve Box
1—8″ Insulkit, consisting of gaskets, sleeves and washers.

6. Station 106+38 (Quantities each station)

2—12″ Flanged Class 150 A.W.W.A. Nut operated IBBM Double disk, gate valves with gaskets bolts and nuts.
2—12″ C.I. Gate Valves
3—12″ Blind Flanges
3—12″ Insulkits consisting of gaskets, sleeves and washers.

7. Station 28+21, 52+66, 53+64, 105+83 (Quantities each station)

1—5′ Brick manhole, complete in place, including materials and labor as shown on Drawing 19-201-7
1—4″ Simplex Air inlet valve & 2″ air release valve assemble as manufactured by the Simplex Valve & Meter Company

1—1", 150 lb. brass gate valve, screwed ends, Crane or equal
1—4" Class 150 A.W.W.A. double disk, IBBM hand wheel operated flanged end gate valve.
1—4" "Insulkit", consisting of gaskets, sleeves and washers.
1—6" Dia C.I. 90° Bend, A.B.
Approximately 30 Lin. ft. 6" Dia. C.I. Class 150 pipe (Vent)
1—6" Dia × 12" Perforated cap (Vent)
1—Denver Heavy pattern Manhole ring and cover
7—Standard C.I. Brick manhole ladder rungs

8. 42+89, 65+45 (Quantities each station)

1—6" Dia. C.I. Class 150 × 24" Pipe, flanged to ASA Cl 125 both ends
1—6" C.I. Flanged Tee, flanged to ASA Cl 125
1—6" Blind flange, ASA Cl 125

[fol. 156]

1—6" Dia. C.I. Cl 150 × 4'-6" ± pipe, one end flanged and one end plain. Flanged to ASA Cl 125
1—6" Dia. C.I. Class 150 M.J. pipe, 20'
7—¾ galv. ladder rungs for embedment in concrete
1—Manhole ring and cover—Denver Heavy Pattern
As reqd. Bricks, waterproofing materials, mortar, bolts, gaskets, etc.
1—6" "Insulket" consisting of gaskets, sleeves and washers.

SCHEDULE III

1. 3142 L.F. 12" Class 150 C.I. T.J. Pipe
2. 2 Each 12" × 6" Class 150, C.I. M.J. Cross
3. 1 Each 12" × 6" Class 150, C.I. M.J. Tee
4. 5 Each 6" C.I. Plugs
5. 2 Each 12" IBBM, AWWA gate valves with boxes
6. 12" C.I. Flanged Adaptor

SCHEDULE IV

1. 3550 L.F. of 12" Class 150 C.I. T.J. Pipe
2. 4 Each 12" × 6" Class 150, C.I. M.J. Cross
3. 1 Each 12" × 8" Class 150 C.I.M.J. Cross
4. 2 Each 22½ Class 150 C.I.M.J. Bends
5. 1 Each 12" IBBM, AWWA gate valve with box
6. 8 Each 6" C.I. Plug
7. 2 Each 8" C.I. Plug
8. 1 Each 12" C.I. Plug
9. 12" C.I. Flanged Adaptor

SCHEDULE V

1. 1,855 L.F. of 8" Class 150 C.I. T.J. Pipe
2. 3 Each 8" × 6" Class 150 C.I.M.J. Cross
3. 2 Each 8" IBBM AWWA gate valve
4. 6 Each 6" C.I. Plug
5. 1 Each 8" C.I. Plug

[fol. 157]

IV—Special Specifications

C—CAST IRON PIPE, FITTINGS, VALVES & VALVE BOXES TO BE FURNISHED BY CONTRACTOR

C01. PIPE: All pipe to be furnished under these specifications shall be centrifugally cast, cast iron pipe. Pipe shall be enamel coated outside and thin cement lined inside. All pipe 6" Diameter and smaller shall conform to the requirements of Federal Specifications WW-P-421, Class 150. All pipe 8" Diameter and larger shall conform to the requirements of Federal Specifications WW-P421a, Class 150. The Manufacturer shall furnish a sworn statement that the inspection and all of the tests to meet the WW-P 421 and WW-P 421a specifications or ASA Class 22, have been made and met.

C02. JOINTS: All pipe and fittings shall have standard Mechanical Joints or Tyton Joints, except flange to spigot adaptors, 18" long. The flanged joint of pipe shall be faced.

and drilled to ASA Class 125 specifications. Bell and spigot joints will not be considered.

C03. FITTINGS: All fittings shall meet these specifications for "Pipe" and shall comply with Class D American Water Works Association Standard specifications for Cast Iron Pressure Fittings with mechanical joints. The fittings to be furnished shall be tees, crosses, reducers and plugs.

C04. GASKETS, BOLTS AND FOLLOWER RINGS: The required materials to make the joints complete shall be furnished with the pipe and fittings, including all gaskets, bolts, nuts and follower rings.

C05. VALVES: All valves shall be double disk, iron body, brass or bronze mounted, non-rising stem, for installing underground water line. Valves shall have mechanical joint ends or flanges as required similar and equal to joints required for the pipe under these specifications. Valves shall have a clear waterway equal to the full nominal diameter of the pipe and shall open by turning to the left. The operating nut shall be 2-inches square and have an arrow cast in the metal indicating the direction of opening. Each valve shall have the makers initials, pressure rating and year in which manufactured cast on the body. Prior to shipment from the factory each valve shall be tested and certified to meet the applicable standard specifications of the American Water Works Association for minimum water working pressure as specified in the schedule for double disk gate valves.

C06. VALVE BOXES: Valve boxes shall be Buffalo Pattern, or equal, adjustable, cast iron, with 5¼" shaft and No. 6 base or bonnet, and provided with screw type adjustment with extension sections designed for a bury of approximately 5 feet. The cover will have the word "WATER" cast in the metal. Valve boxes shall be set, backfilled and tamped so as to be and remain in a vertical position. The covers shall be adjusted accurately to finished grade or natural ground level as the case may be, unless otherwise specified.

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4(b)

Copy of Quotation for Prove Office

~~4(b)~~ 9-6

RECEIVED
AUG 10 9 06 AM '59
PSCIPCO

August 6, 1959

To: Contractors Bidding on Subject Job

Quotation No. D59-237

Gentlemen:

BID OPENING 11 Aug.1959

SUBJECT: PLATTE CANYON WATER & SANITATION DISTRICT
LITTLETON, COLORADO

WE ARE PLEASED TO QUOTE YOU ON MATERIALS SET FORTH BELOW CONFORMING TO SPECIFICATIONS IN OUR CATALOG AND SUBJECT TO THE TERMS AND CONDITIONS AS MENTIONED ON THE BACK OF THIS SHEET AND HEREBY MADE A PART HEREOF ON THIS PROPOSAL, EXCEPT AS HEREINAFTER MODIFIED:

Pacific States Super de Lavaud, Class 150, Tyton Joint, Fed. Spec. WW-P-421a, thin cement lined, seal coated cast iron pipe in 18' laying lengths for water service:

Approx.	70 feet of 6-inch Pipe	$1.995	per ft. (Fed.Spec.WW-P-421)
"	1855 feet of 8-inch Pipe	2.818	" "
"	6492 feet of 12-inch Pipe	4.811	" "

Pacific States AWWA Standard, Class 250, Mechanical Joint, tar coated cast iron water pipe fittings:

4 Pcs.	6"	All Bell 90 Degree Bends	$20.52	ea.
19 "	6"	Plugs	5.22	"
3 "	8x6"	All Bell Crosses	51.79	"
3 "	8"	Plugs	8.05	"
1 "	12x8"	All Bell Crosses	84.37	"
6 "	12x6"	All Bell Crosses	78.70	"
1 "	12x6"	All Bell Tee	71.82	"
2 "	12"	Flange & Spigot Adapters	26.55	"
2 "	12"	All Bell 22½ Degree Bends	49.86	"
1 "	12"	Plug	16.20	"

EXHIBIT 4(b)

TO: Contractors Bidding on
Platte Canyon Water & Sanitation District
Littleton, Colorado

QUOTATION NO. D59-237

DATE: Aug. 6, 1959 Sheet No. 2

*4	Pcs.	4"	Insul Kits w/bolts and nuts	$6.96 ea
*21	"	6"	" " " " "	8.83 "
*3	"	8"	" " " " "	10.93 "
*3	"	12"	" " " " "	21.60 "
*	"	4"	Blind Flanges	2.89 "
*21	"	6"	" "	4.72 "
*3	"	8"	" "	6.97 "
*3	"	12"	" "	15.75 "
*2	"	6"	Flange & Flange Pipe, 24" long	36.51 "
*2	"	6"	Flange & Spigot Pipe, 4'6" long	29.24 "
*2	"	6"	Flanged Tees	21.75 "

Pacific States List 4, AWWA Standard, iron body, bronze mounted, non-rising stem Gate Valves:

4	Pcs.	4"	Flanged Gate Valves	$37.30 ea
19	"	6"	Flanged Gate Valves	56.25 "
4	"	8"	Flanged Gate Valves	84.37 "
2	"	12"	Flanged Gate Valves	184.99 "
2	"	8"	Mechanical Joint Gate Valves	91.03 "
5	"	12"	Mechanical Joint Gate Valves	185.67 "
*3	"	16"	Open Bell (Lead Joint) Gate Valves	415.00 "
*27	"	P11-8	Valve Boxes (Screw Type, 36-48" Extension)	14.50 "

*Items marked thus will be furnished and invoiced by Dana Kepner Co. of Denver and are included in this quotation for your convenience.

The material list herein is believed to be correct, but cannot be guaranteed.

The prices quoted herein on Mechanical Joint items include all necessary glands, gaskets and bolts.

The prices quoted on Tyton Joint Pipe include all necessary gaskets and lubricant. Tyton installation tools can be furnished at a nominal charge which will be credited upon return of tools in good condition.

The prices quoted herein are f.o.b. our foundry at Ironton (Provo), Utah with full present 35,000 lbs. truckload freight allowed to Littleton, Colorado; therefore, these are delivered prices.

Prices are firm for prompt acceptance and prompt shipment.

Copy of Quotation for Provo Office

D59-237

PACIFIC STATES CAST IRON PIPE CO.

August 6, 1959 Quotation No 3

To Contractors Bidding on
Platte Canyon Water & Sanitation District
Littleton, Colo.

Date Sheet No.

Truckload shipment is limited to destinations to which the rate mentioned is applicable and to terrain where standard tractor and semitrailer can operate without difficulty, customer to unload per requirements of carrier. Your particular attention is called to the necessity of unloading the truck during four working hours after its arrival, under normal conditions, to avoid extra charges. Mechanical equipment must be furnished and operated by the customer for unloading pipe larger than 6-inch.

Terms are net 30 days from date of invoice, subject to acceptance of customer's credit by our Accounting Department.

Shipment can be made within approximately 4 weeks after receipt of order, or signed, accepted copy of this proposal.

HFK:o

There are no agreements or verbal understandings outside of this proposal. The foregoing shall become a contract agreement only when accepted by you as purchaser and approved in writing by an executive officer of our company at our home office at Provo, Utah.

PACIFIC STATES CAST IRON PIPE COMPANY

By H H Kelsey

Manager Denver Office

To the PACIFIC STATES CAST IRON PIPE CO.:

Your proposal as above is hereby accepted this

day of 193 APPROVED AT PROVO, UTAH, this

day of 193

By:

(Title)

By:

General Manager and Treasurer

[Fol. 160]

149

[fol. 162]

Brothers
D-78697-F

12" Pipe
Wed & Mon

Wire → can be
pickup

Die Fri & Mon
best we can do.

Doug told them this / Doug.
10/5

[redacted]

7/31/59 41
Engineer T[redacted]s Due Aug. 11 at 5 p.m.
Pipe Lines, [redacted]
Arapahoe [redacted]rson Counties, Colo. along [redacted]an blvd.
Owner—Platte Canyon Water and Sanitation Dist., Littleton, Colo. (Robert [redacted] Atty., Majestic bldg., Denver).
Engr.—Dale [redacted] 2200 Chenango, Littleton, Colo.
Includes (owner will furnish and contr. will install) 5276 ft. 18 inch stl pipe and fittings; 5358 ft. 16 inch stl. pipe & fittings; (contr. will furnish valves; air valves; manholes; contr. will furnish & install) 1 mile of 12 inch cast iron pipe; 1 mile 8 inch cast iron pipe. (Plans obtainable from engr. upon $25 deposit, 5% bid bond required)

SUPPLIES & EQUIPMENT

5276' 18

5358' 16

3131 12

3561 12

1055 8"

INTER-OFFICE MEMO

PACIFIC STATES CAST IRON PIPE COMPANY

RECEIVED
AUG 5 8 41 AM '59
PSCIPCO

FROM Denver Office DATE August 3, 1959

TO Provo Office ATTENTION OF Mr. L. G. Anderson

SUBJECT PLATTE CANYON WATER & SANITATION DISTRICT
LITTLETON, COLORADO
BID OPENING 11 AUGUST 1959

Dear Glade:

Will you please send us prices and shipment to quote contractors on the following materials:

Approx. 1855 feet of 8", Class 150, ASA, TCL, Tyton Joint Pipe
" 6692 feet of 12", Ditto

Miscellaneous fittings and valves

Please base your prices on truck delivery to Littleton, Colorado, which is in the Denver zone.

Very truly yours,

H. F. Kepner

HFK:ot

246 tons

Get Rates

[6] 164

WESTERN UNION
TELEGRAM

GA

PS5 WUX PROVO UTA OCT 5 1959

DANA KEPNER COMPANY
DXXX FAX DENVER COLORADO

WARNER BROTHERS D 78697 CAN PICK UP LOAD 12" PIPE FRIDAY AND AGAIN MONDAY.

PZFICIXXX PACIFIC STATES CAST IRON PIPE CO
D78697 12"

WESTERN UNION
TELEGRAM

(Uniform Domestic Straight Bill of Lading adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930 and June 15, 1941.)

3rd SHEET

THIS MEMORANDUM is an acknowledgment that a bill of lading has been issued and is not the original Bill of Lading but a copy or duplicate covering the property named herein, and is intended solely for filing or record.

Shipper's No.

Agent's No.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

at IRONTON, UTAH 40191 7 Dec. ,19 59

from PACIFIC STATES CAST IRON PIPE CO.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to WARNER BR / Pipelines Inc.

Destination Littleton State of Colo. County of

Route Called B-78697

Class or Rate Car Initial Car No.

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)
28	12"x18'1½" AS. CI Tyton Joint SL Pipe	33,651#

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

Fed. 165

154

EXHIBIT 4(d)

at IRONTON, UTAH 40191 7 Dec. ,19 59

from PACIFIC STATES CAST IRON PIPE CO.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to WARNER BR.. Pipelines Inc.

Destination Littleton State of Colo. County of

Route Called B-78697

Class or Rate Car Initial Car No.

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)
28	12"x18'1½" AS.. 22 Tyton Joint CL Pipe	33,651#

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per

PACIFIC STATES CAST IRON PIPE CO., Shipper.

Per , Agent.

Per

Permanent postoffice address of Shipper PROVO, UTAH

3

ERT. ALLOWED ON $289.40

TOB 2-57 UABCO

Exhibit 4(d)

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination or tender of delivery of the property to the party entitled to receive it has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: **Provided**, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: **Provided**, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: **Provided**, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: **Provided**, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges: **Provided**, that where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignee, consignor, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property, but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce

[fol. 196]

(c) In case of quarantine, the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: *Provided*, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for its convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignee), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the point of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse, or place of delivery of the carrier, subject to the tariff charge for storage, and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: *Provided*, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped under cards, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: *Provided*, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage, at private or public sale: *Provided*, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property. But, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignee stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges: *Provided*, That, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property, and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property for (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of the transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property, but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignee has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignee shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to sail at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees; nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers as to quarantine laws or regulations. The Shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. 7(a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight, charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury, or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property, shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for its convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein and then only if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration of further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property, and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section, and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances, whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to sail at any port or ports, in or out of the customary route, to tow and be towed, to transfer, transship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Tallied by

28-12 18' USA 22 Type Joints

24-6 18' USA 22 Type Joints

1	1266		+20
2	1184		+66
3	1182		+54
4	1176		+58
5	1150		+66
6	1108		+50
7	1168		+76
8	1166		+44
9	1110		+48
10	1100		+40
11	1200		+40
12	1113		+45
13	1220		+66
14	1088		+46
15	1116		+60
16	1104		+52
17	1101		+20
18	1090		+34
19	1105		+32
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22	1110		+50
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24	1120		+60
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27	1101		10,865
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Form 8

PACIFIC STATES CAST IRON PIPE CO.

INVOICE

McWANE PACIFIC BOLTITE MECHANICAL JOINT • BELL AND SPIGOT PRESSURE PIPE • GATE VALVES • FIRE HYDRANTS

General Office and Foundries — P. O. Box 18, Provo, Utah

er D-7869; A

ORDER NO 32193
ORDER DATE Sept. 18, 1959.
YOUR ORDER
YOUR REQ

ORDER NO 40191
INVOICE NO
INVOICE DATE DEC 7 59

SOLD TO Warner Brothers Company
5505 Vance St.
Arvada, Colorado

CAR NO

SHIP TO Same: Platte Canyon Water & Sanitation District
Littleton, Colo.

ROUTE CALLED

RATE

R. R. DESTINATION

FINAL DESTINATION LITTLETON, COLO.

F. O. B. FOUNDRY, FRT. ALLOWED AT 17.20 N.T.

TERMS 30 DAYS NET

DESCRIPTION & QUANTITY ORDERED			QUANTITY SHIPPED PIECES	QUANTITY SHIPPED FEET	UNIT PRICE	AMOUNT
COMPLETE REVISION OF ORDER						
4 Pcs.	6"x18'	Class 150, TYTON JOINT, THI CEMENT LINED SEAL COATED, SUPER DELAVAUD Cast Iron Pipe. Fed. Spec. WW-P-421. Wt. Per Ft. 25.5#. Wt. Per Length 460#. 72'				
103 "	8"x18'	Class 150, TYTON JOINT, TH CEMENT LINED, SEAL COATED, SUPER DELAVAUD Cast Iron Pipe. Fed. Spec. WW-P-421a Wt. Per Ft. 36.9#, Wt. Per Length 665#. 1854'				
361 "	12"x18'	Class 150, TYTON JOINT, TH CEMENT LINED, SEAL COATED, SUPER DELAVAUD Cast Iron Pipe. Fed. Spec. WW-P-421a Wt. Per Ft. 53.6#, Wt. Per Length 1140#. 6498'	28	507'6"	4.811 FT.	2441 58 2441 58
			LESS FRT. ON 33651 LBS.			— 289 40 2152 18
4 "	6"	Tyton Plain Rubber Gaskets		2% COLO. TAX		— 43 04 2195 22
103 "	8"	Tyton Plain Rubber Gaskets				
361 "	12"	Tyton Plain Rubber Gaskets				
5 Gals.		Tyton Lubricant				
1 Qt.		Tyton Lubricant				
1 Pint		Tyton Lubricant				
2% COLO. STATE SALES TAX			DK 2½	215218	53 80	$

EXHIBIT 4(d)

SOLD TO: Warner Brothers Company
5505 Vance St.
Arvada, Colorado

CAR NO.

SHIP TO: Sales: Platte Canyon Water & Sanitation District
Littleton, Colo.

ROUTE: CALLED

R R DESTINATION

RATE

FINAL DESTINATION: LITTLETON, COLO.

F O B: FOUNDRY FRT. ALLOWED AT 17.20 N.T.

TERMS: 30 DAYS NET

DESCRIPTION & QUANTITY ORDERED	QUANTITY SHIPPED PIECES	QUANTITY SHIPPED FEET	UNIT PRICE	AMOUNT
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				2441 58
	LESS FRT. ON 33651 LBS.			289 40
				2152 18
	2% COLO. TAX			43 04
				2195 22
4 " 6" Tyton Plain Rubber Gaskets				
103 " 8" Tyton Plain Rubber Gaskets				
361 " 12" Tyton Plain Rubber Gaskets				
5 Gals. Tyton Lubricant				
1 Qt. Tyton Lubricant.				
1 Pint Tyton Lubricant				
2% COLO. STATE SALES TAX	DK 2½	215218	53 80	

TERMS AND CONDITIONS OF THIS SALE ARE PRINTED ON THE BACK OF THIS INVOICE, AND ARE MADE A PART HEREOF.
ALL CLAIMS FOR WHICH WE MAY BE RESPONSIBLE MUST BE MADE WITHIN 10 DAYS FROM RECEIPT OF SHIPMENT.
FREIGHT ALLOWANCE IS BASED ON RATE QUOTED. CONSIGNEE ASSUMES RISK IN PAYING ANY ADDITIONAL AMOUNT WITHOUT OUR AUTHORITY. IN ORDER FOR YOU TO COLLECT FOR LOSS OR DAMAGE IN TRANSIT, NOTATION MUST BE MADE BY FREIGHT AGENT ON PAID EXPENSE BILL. DEDUCTIONS FROM THIS INVOICE FOR LOSS OR DAMAGE CANNOT BE ALLOWED.
BY ORDER OF INTERSTATE COMMERCE COMMISSION, CARRIERS CANNOT PAY CLAIMS FOR LOSS OR DAMAGE UNLESS FILED WITH THEM WITHIN FOUR (4) MONTHS AFTER DELIVERY OF SHIPMENT, OR IN CASE OF FAILURE TO DELIVER, THEN WITHIN FOUR (4) MONTHS AFTER REASONABLE TIME FOR DELIVERY HAS ELAPSED.
We, the undersigned, do hereby guarantee that the articles or commodities listed herein were produced or manufactured in accordance with the Federal Child Labor Act of September 1, 1916.

PACIFIC STATES CAST IRON PIPE CO

TERMS AND CONDITIONS

1—Quotations are for immediate acceptance only and subject to change without notice.

2—Agreements are contingent upon strikes, fires, accidents, car shortage, or any other causes beyond our control.

3—Shipping promises count from receipt at foundry of full manufacturing and shipping details; they are based upon present expectations but are not guaranteed. Material in stock is offered, subject to prior sale.

4—Delivery is to be made F. O. B. seller's foundry, upon which seller's responsibility ceases.

5—Freight charges when included in the selling price, are to be paid by the buyer. Freight allowance is based on a specific rate to agreed destination and when shipments are forwarded freight collect the amount of freight is to be deducted by us on the face of the invoice. Consignee assumes the risk in paying any additional charges without our consent.

6—PAYMENT: Net cash in Provo, Utah, unless otherwise agreed in writing.

7—CLAIMS: All claims for corrections or deductions must be made within ten days after receipt of goods.
All material is rigidly tested and inspected at the foundry and is carefully loaded. Seller agrees to replace at agreed point of delivery any material proven defective, or which does not conform to the specifications shown in the order placed in acceptance of this quotation.
The measure of the damage is the price of defective material only. No charge for labor or expense required to repair defective material, or for any consequential damages, will be allowed.
Claims for breakage or loss in transit must be filed with the carrier's agent promptly, as the Inter-State Commerce Commission prohibits carriers from paying loss or damage claims unless such claims are filed with them within four months after delivery date. It is impossible to collect for damaged or lost articles unless you have the original bill of lading and the original receipted freight bill with exception showing the loss or damage and signed by the carrier's agent. In case of damage by the carrier, we will, if desired, make claim on behalf of our customers, provided we are supplied with the necessary data to substantiate the claim.

8—When orders have been filled as specified, no goods may be returned; nor will any credit be allowed, unless our consent has first been secured, and all goods returned will, if accepted, be credited less the cost of handling and the freight and cartage expenses incurred.

9—All orders submitted to us through our division sales offices, sales agents, or direct to the general office by the buyer, must be subject to the approval of the Vice President, Treasurer, or General Sales Manager of the Pacific States Cast Iron Pipe Company at Provo, Utah, for final acceptance.

10—Unless assented to by the proper official of our company, in writing, no terms or conditions at variance with, or in addition to, those indicated herein shall apply to any transaction resulting from this quotation.

PACIFIC STATES CAST IRON PIPE CO.

[fol. 170]

EXHIBIT 5(a)

BEFORE THE STATE TAX COMMISSION OF UTAH

CONTRACT DOCUMENTS
City of Pueblo, Colorado
SECONDARY SEWAGE DISPOSAL PLANT

[fol. 171]

NOTICE TO CONTRACTORS

City of Pueblo, Colorado
Additions to Sewage Disposal Plant

Sealed proposals for furnishing all labor and materials, and performing work for the construction of Secondary Treatment Structures, Equipment, and appurtenances thereto, at the Pueblo Municipal Sewage Disposal Plant, approximately two miles east of Pueblo, will be received at the office of the Purchasing Agent of the City of Pueblo City Hall, Pueblo, Colorado, until 2:00 P.M. Feb. 27, 1958, at which time the proposals will be publicly opened, read aloud and canvassed.

Copies of Plans and Specifications, and other Contract Documents, are on file, and may be viewed in the office of the City Engineer, City Hall, Pueblo, Colorado, or in the offices of the Consulting Engineer for the City of Pueblo, S.F. Elliot, 111 E. 5th Street, Pueblo, Colorado.

A complete set of Plans, Specifications and Contract Documents may be obtained from S.F. Elliot upon deposit of $25.00, all of which will be refunded to each actual bidder upon return of all Plans, Specifications and Contract Documents in good condition within 30 days of the above opening date. Additional sets of Documents may be purchased at the rate of ten dollars ($10.00) each, not refundable.

Proposals are to be prepared on forms furnished as a part of the Contract Documents and shall be accompanied

by a certified check, cashier's check drawn on a reputable bank, or bidder's bond, in an amount equal to ten percent (10%) of the total amount of the proposal as submitted, made payable to the City of Pueblo without condition.

The right is reserved, by the City of Pueblo, Colorado, to reject any and all bids, to waive any informality in bids received, and to accept the lowest bid that it deems best for the proper and most economical execution of the work.

CITY OF PUEBLO, COLORADO

/s/ K. L. Tharp,
Purchasing Agent

First Publication 3 Feb. '58
Second Publication 17 Feb. '58

[fol. 172]

CONTRACT AGREEMENT

THIS AGREEMENT, made and entered into this ..... day of ....., 19 ....., by and between Pueblo a Municipal Corporation, Pueblo, Colorado, as party of the first part, and hereinafter termed the "Owner", and .....

.....

.....

PARTY OF THE SECOND PART, hereinafter termed in this agreement, the "Contractor".

WITNESSETH: That whereas, the Owner, has caused to be prepared, in accordance with law, specifications, plans and other contract documents for the work herein described, and has approved and adopted these contract documents and has caused to be published in the manner and for the time required by law, an advertisement inviting sealed proposals for furnishing materials, labor and equipment for and in connection with the construction of the additions to the Pueblo Municipal Sewage Disposal Plant, Pueblo, Colorado; and

WHEREAS, the Contractor, in response to the advertisement has submitted to the Owner in the manner and at the

time prescribed a sealed proposal, in accordance with the terms of this contract; and

WHEREAS, the Owner, in the manner prescribed by law, has publicly opened, examined, and canvassed the proposal submitted, and as a result of such canvas, has determined and declared the party of the second part to be the lowest and best bidder for constructing said additions to the Sewage Disposal Plant and has duly awarded to the said party of the second part a contract therefor, for the sum or sums named in the proposal attached to and made a part of this contract;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That the parties to these covenants, in consideration of the compensation to be paid the party of the second part, and of the mutual agreements, herein contained, have agreed and hereby agree, the party of the first part for itself, and its successors, and the party of the second part, for itself, himself, or themselves, its, his or their successors and assigns, or its, his or their executors and administrators, as follows;

ARTICLE 1. That the Contractor will furnish at his own cost and expense, all labor, tools, equipment and materials, except as otherwise specified, construct and complete, and in a good, first class, and workmanlike manner, the work as designated, described and required by the plans, specifications and proposal, all in accordance with the plans, specifications, contract stipulations, advertisement, instructions to bidders, proposal, and other specified contract documents on file in the office of the Director of Public Works, [fol. 173] Pueblo, Colorado, and all of which contract documents form the contract, and are as fully a part hereof as if repeated verbatum herein, and all work to be done under the direct supervision and to the entire satisfaction of the Engineer(s) and the Owner, and in accordance with the laws of the State of Colorado.

ARTICLE 2. That the Owner will pay the Contractor for the performance of this contract, and the Contractor will accept in full compensation therefor the prices stipulated in the proposal attached to and made a part hereof, for all work covered by and included in the award of contract

enumerated herein under Article 1, in the amount, the total of which is approximately .....
..... dollars ($.....), the true total amount to be determined upon final measurement of all quantities upon completion of the work.

ARTICLE 3. That the Contractor will commence work within ten (10) days from and after the date of the acceptance by the Owner of his proposal and shall complete the entire work covered by this contract within three hundred and sixty-five (365) calendar days (excepting days in which weather conditions prohibit work and other exceptions heretofore noted) from and after due notification by the Owner to commence work.

IN WITNESS WHEREOF, Pueblo a Municipal Corporation, Pueblo, Colorado, Owner, party of the first part, has caused this contract to be executed under the authority vested in them by law and said party of the second part has executed three counterparts of this contract in the prescribed form and manner, the day and year first above written.

PUEBLO A MUNICIPAL CORPORATION
Party of the First Part

BY .....

Party of the Second Part

BY .....

BY .....

SEAL

ATTEST:

.....
City Clerk

APPROVED AS TO FORM:

.....
City Attorney

[fol. 174]

SPECIFICATIONS

PIPE WORK:

Excavation: All excavation shall be done by open cut from the surface, except when tunneling is expressly herein permitted or directed in writing by the Engineer. Trenches shall be excavated along the lines and to the grades given in the plans; and shall be, except from elevation of spring line of pipe to the sub-grade, at least twelve (12) inches wider than the external diameter of the body of pipe intended to be laid therein. Sub-grade shall be the extreme bottom of pipe. Machine excavation, except in rock, shale or other similar material, shall be held above elevation of sub-grade sufficient to permit shaping of the trench by hand to fit bottom of the pipe to be laid, so that the pipe will have firm bearing from end to end, bell locations being dug out so that weight of backfill will be carried on the body of pipe and not concentrated on the bell. Where fill is required under pipe, from whatever cause, it shall consist of good filling material thoroughly compacted.

The material from pipe trenches shall be placed compactly on the side of the excavation and kept up so as not to endanger the work or removed from the site of work, in part or all, to the borrow area as outlined under "Grading" above.

Backfilling: Unless otherwise directed by the Engineer, all trenches and excavations for concrete pipe shall be hand-
[fol. 175] backfilled with suitable material and hand tamped up to the spring line of the pipe promptly after the pipe is laid or structure is built therein, backfill to be brought up and tamped along each side of the pipe in such manner as to avoid displacement of or damage to the pipe. If the backfill material is such that it will not break or crack the pipe when shoved into the trench, the hand-backfill may be stopped at the spring line; otherwise hand-backfill shall be continued to one foot over the top of pipe. The backfill shall then be continued in such manner as hereinafter provided. Backfilling of Cast Iron and other pipe shall be

done in a manner normally approved for covering Cast Iron pipe for water mains.

Excavated material will generally be considered satisfactory for backfill purposes. All backfill material shall be free from rubbish, frozen material or stones over one cubic foot in volume. When stones within this limit are present in backfill, they must be separated by earth or other fine material. When excavated material is not satisfactory, in the opinion of the Engineer, for use as backfill or whenever there is a shortage of satisfactory backfill material from any cause, the Contractor shall furnish all necessary suitable material at his own expense. Pit run coarse sand, or gravel containing a relatively small quantity of stones not more than three (3) inches in diameter, will be satisfactory for use as backfill material.

Reinforced Concrete Pipe: Concrete pipe and specials shall be standard length, machine made of best quality concrete, and conform to A.S.T.M. specifications except that cement used shall be Type II. Unless otherwise specified in the Proposal, pipe and specials shall conform to STANDARD SPECIFICATIONS FOR REINFORCED CONCRETE SEWER PIPE, A.S.T.M. Designation C75-41 and shall be known as "Reinforced Concrete Sewer Pipe".

Jointing of Concrete Pipe: The joints shall be made watertight by being completely and carefully filled with cement mortar composed of one part of Portland Cement and two parts sand. Sand and cement for mortar shall be mixed thoroughly while dry in suitable boxes, and a sufficient quantity of water added to form a paste of proper consistency. All mortar shall be freshly made and no retempered mortar, nor mortar after it has received initial set, shall be used. When concrete pipe is being used with mortar joints, the ends of both sections of the pipe to be joined shall be thoroughly wetted before mortar is applied. The mortar shall be applied in the following manner, viz: Carefully place a proper thickness of the mortar in lower one-third of the bell; then insert the next pipe in the bell, taking care that the pipe is clear of the mortar until the end of the pipe is pushed home, then gently work the

end of the pipe down and into the mixture to line and g ade; at this stage the work of making mortar joint shall be suspended until earth is packed and thoroughly rammed about the lower half or part of the body of the pipe in such manner that the pipe will be thereafter held firmly in its place; care shall be taken that no earth shall get [fol. 176] into the unfilled portion of the joint; then fill the remaining and upper two-thirds of the joint by pushing th rein with the thumbs sufficient of the mortar mixture to ompletely fill the annular space, all the while exercising great care to keep the flow line or inside bottom of the pipe to-gether, or so as to give a smooth and even grade along the bottom of the pipe; then complete the joint by applying with the hands or with trowel a collar of the mortar around the pipe, taking care to neatly level off the collar from the outer edge of the bell at an angle of forty-five (45) degrees. After a joint is completed, the inside of the pipe at the joint must be thoroughly cleaned of any of the mortar mixture that may have been pushed through. To this end a suitable scraper or follower must be provided and used immediately after making each joint. After the pipe has been put in place and mortar joint made, it shall not be disturbed by walking thereon or in any other manner.

Cast Iron Pipe: Cast iron pipe, Bell and Spigot, Mechanical Joint, and Flanged Ends, shall conform in all respects to A.S.A. A-21.1 and A-21.11 or Federal Specification WW-P-421a for Class 150 Cast Iron Pipe. Cast Iron Fittings and Flanges shall conform in all respects to ASA B16.1 for Class 125 Cast Iron Pipe.

Water Pipe, Sampling Lines and Support Pipe: All water supply lines, sampling lines in pump station, and discharge line from bilge pump, shall be galvanized wrought iron pipe, thread connected on smaller sizes. All fittings shall be galvanized, and all reductions made with standard fittings. All unions shall be provided with non-corrosive metal seats. Flanged union connections where required, made with standard companion flanges, shall be used for pipe three (3) inches in size and larger.

Steel Pipe: Steel Pipe shown on the plans for drain lines, shall be galvanized copper-bearing steel pipe, twelve (12) gage, with all seams welded. Pipe shall be plain end for field coupling by drive joint coupling, except at beginning of runs where plate flanges are used for connection to flanged gate valves. Wall thimbles of steel shall be one-fourth (1/4) inch wall welded steel pipe, with ends treated as shown on the plans for the various applications.

Installation of twelve (12) inch steel pipe under existing concrete pipe, and eighteen (18) inch steel pipe under existing irrigation ditch shall be made by jacking or tunneling. Open cutting shall not be permitted without written consent of the Engineer at the time of such installation.

Pipe and Couplings are to be furnished as manufactured by the Thompson Pipe and Steel Company, Denver, or equal, and installation shall follow manufacturers recommendations and instructions furnished with the order of materials.

Valves: All equal sized valves shall be furnished by a single manufacturer, and shall be Crane, Iowa or approved equal.

[fol. 177] 1. Gate Valves: Four (4) to eighteen (18) inch gate valves where indicated on the plans shall be non-rising stem, light pressure, 125 pound standard flanges and open left. Installation and type of operating device will be dictated by its location as indicated in the plans.

2. Water Line Valves: Each water line valve shown on the plan and as required for a complete installation, shall be one hundred (100) pound brass gate valve, wedge disc, non-rising stem, Crane or approved equal.

3. Miscellaneous Items: One hose connection shall be installed in the pump station. There shall be four (4) inch hydrants provided at the ends of each run of four (4) inch main water piping as indicated on the plans. Cast Iron valve boxes and operating keys shall be provided for all under ground valves, and hand wheels on all exposed valves.

[illegible] PLANT

[illegible] QUANTITIES

EARTH WORK

Site Grading	[illegible]	[illegible]
Structural Excavation	4,70[illegible]	fill
Grade Material and Base material	[illegible]	waste
Pipe Trenching for approx 3000 lin. ft	12,60[illegible]	yd
	3,500 cu	yd.

REINFORCED CONCRETE:

Mixing basin	300 cu yd
Primary Settling Basin	930 cu. yd.
Three Trickling Filters	1,905 cu. yd.
Two Secondary Settling Basins	2,865 cu. yd.
Sludge Pump House	35 cu. yd.
Parshall Flume	70 cu. yd.
Miscellaneous Structures	270 cu. yd.
	6,375 cu. yd.

MECHANICAL EQUIPMENT AND MACHINERY:

Mixing Basin - 250 Porous plates

Primary Settling Basin - one sludge collector
Channel Screens

Trickling Filters - three Rotary Distributors
three steel gates
underdrain block
vent pipe
7,800 cu. yd. slag

Secondary Settling Basins -
two sludge collectors
effluent trough
drains on effluent boxes

Sludge Pump House - two sludge pumps
one bilge pump
sampling sink

Parshall Flume - one 54" sluice gate with electric lift
one measuring and recording device

Existing Primary Settling Basins -
Conversion of drive equipment and screens in effluent troughs

Miscellaneous [illegible]	[illegible] accessories one [illegible] necessities three [illegible] sluice gates with electric fittis. one 42" sluice gate with electric fitt three 36" sluice gates with electric fitts 360 ft of 18" steel pipe 400 ft of 12" steel pipe 1560 ft of 8" CI pipe 460 ft of 6" CI pipe 780 ft of 4" WI pipe specials bends valves and accessories
REINFOPCED CONCRETE PIPE	335 ft of 54" concrete pipe 150 ft of 48" concrete pipe 200 ft of 42" concrete pipe 740 ft of 36" concrete pipe specials bends and accessories for all sizes of concrete pipe
ELECTRICAL WORK	Lighting wiring of motor controls wiring of measuring device cable, conduit, wire etc.

February 21, 1958

To Contractors Bidding on this Subject Job:

Quotation No. 258-60

Gentlemen:

SUBJECT: Sewage Disposal Plant, Pueblo, Colorado — BID OPENING 27 Feb. 1958

WE ARE PLEASED TO QUOTE YOU ON MATERIALS SET FORTH BELOW CONFORMING TO SPECIFICATIONS IN OUR CATALOG AND SUBJECT TO THE TERMS AND CONDITIONS AS MENTIONED ON THE BACK OF THIS SHEET AND HEREBY MADE A PART HEREOF ON THIS PROPOSAL, EXCEPT AS HEREINAFTER MODIFIED:

Pacific States Super de Lavaud, Class 150, Fed. Spec. WW-P-421a, Mechanical Joint, tar coated, Cast Iron Pipe, for water service:

Approx.	460 ft.	6-inch, Pipe ————	$ 2.083 per ft.
"	1360 ft.	8-inch, Pipe ————	2.958 " "

Pacific States AWWA Standard, Class 250, Mechanical Joint, tar coated, cast iron water Pipe Fittings:

1 Pc.	4"	All Bell 90° Bend, ————	$ 12.96	
10 Pcs.	4"	Double Hubs W/2" I.P.T. tap ————	13.39	ea.
2 Pcs.	6x4"	Bell & Spigot Reducers, SEB ————	11.56	"
2 Pcs.	6"	All Bell Tees, ————	29.41	"
4 Pcs.	6"	All Bell 90° Bends, ————	19.38	"
1 Pc.	6"	All Bell 45° Bend, ————	17.77	"
1 Pc.	6"	All Bell 22½° Bend, ————	17.77	"
1 Pc.	6"	All Bell 11¼° Bend, ————	17.77	"
3 Pcs.	8"	All Bell 90° Bends, ————	27.67	"
5 Pcs.	8"	All Bell 45° Bends, ————	24.69	"
2 Pcs.	8"	All Bell 22½° Bends, ————	24.69	"

(Continued on Sheet No. 2)

[fol 180]

EXHIBIT 5(b)

Copy of Quotation for Provo Office

PACIFIC STATES CAST IRON PIPE CO

Quotation No. D58-60

To
To Contractors:

Date February 21, 1958 Sheet No. 2

[fol. 181]

Pacific States List 4, AWWA Standard, iron body, bronze mounted, non-rising stem Mechanical Joint Gate Valves;

2 Pcs. 4" Gate Valves ———————— $ 36.21 Each

The material list herein is believed to be correct, but cannot be guaranteed.

The prices quoted herein on Mechanical Joint items include all necessary glands, gaskets and bolts.

The prices quoted herein are f.o.b. our foundry at Ironton (Provo), Utah with full present 35,000 lb. minimum rate of truckload freight allowed to Pueblo, Colo. Any change in freight rate between date of this quotation and date of shipment to be for the customer's account.

Truckload shipment is limited to destinations to which the rate mentioned is applicable and to terrain where standard tractor and semitrailer can operate without difficulty, customer to unload per requirements of carrier. (Your particular attention is called to the necessity of unloading the truck during four working hours after its arrival, under normal conditions, to avoid extra charges. Mechanical equipment must be furnished and operated by the customer for unloading pipe larger than 6-inch.)

Terms are net 30 days from date of invoice, subject to acceptance of customer's credit by our Accounting Department.

Shipment can be made within approximately one week after receipt of order, or signed, accepted copy of this proposal.

Prices are firm for prompt acceptance and prompt shipment.

All prices quoted herein are based on our receiving the entire order, unless otherwise mutually agreed upon.

There are no agreements or verbal understandings outside of this proposal. The foregoing shall become a contract agreement only when accepted by you as purchaser and approved in writing by an executive officer of our company at our home office at Provo, Utah. And subject to the Terms and Conditions printed on the back of the first sheet of this quotation.

PACIFIC STATES CAST IRON PIPE COMPANY

By

Manager Denver Office

To the PACIFIC STATES CAST IRON PIPE CO.:

2 Pcs. 4" Gate Valves ---------- $ 36.21 Each

The material list herein is believed to be correct, but cannot be guaranteed.

The prices quoted herein on Mechanical Joint items include all necessary glands, gaskets and bolts.

The prices quoted herein are f.o.b. our foundry at Ironton (Provo), Utah with full present 35,000 lb. minimum rate of truckload freight allowed to Pueblo, Colo. Any change in freight rate between date of this quotation and date of shipment to be for the customer's account.

Truckload shipment is limited to destinations to which the rate mentioned is applicable and to terrain where standard tractor and semitrailer can operate without difficulty, customer to unload per requirements of carrier. (Your particular attention is called to the necessity of unloading the truck during four working hours after its arrival, under normal conditions, to avoid extra charges. Mechanical equipment must be furnished and operated by the customer for unloading pipe larger than 6-inch.)

Terms are net 30 days from date of invoice, subject to acceptance of customer's credit by our Accounting Department.

Shipment can be made within approximately one week after receipt of order, or signed, accepted copy of this proposal.

Prices are firm for prompt acceptance and prompt shipment.

All prices quoted herein are based on our receiving the entire order, unless otherwise mutually agreed upon.

There are no agreements or verbal understandings outside of this proposal. The foregoing shall become a contract agreement only when accepted by you as purchaser and approved in writing by an executive officer of our company at our home office at Provo, Utah. And subject to the Terms and Conditions printed on the back of the first sheet of this quotation.

PACIFIC STATES CAST IRON PIPE COMPANY

By _____

Manager Denver Office

To the PACIFIC STATES CAST IRON PIPE CO.:

Your proposal as above is hereby accepted this

day of _____ 19 _____

By: _____

(Title)

APPROVED AT PROVO, UTAH, this

day of _____ 19

By: _____

Vice-President and Treasurer

Form 149 Rev.

INTER-OFFICE MEMO

RECEIVED

PACIFIC STATES CAST IRON PIPE COMPANY

MAR 3 8 34 AM '58

PSCIPCO

FROM Denver Office DATE February 28, 1958

TO Provo Office ATTENTION OF Mr. T. L. Johnson

SUBJECT SEWAGE DISPOSAL PLANT
PUEBLO, COLORADO.
QUOTATION NO. D58-60

Dear Len:

We attended this bid opening yesterday at the City Hall in Pueblo, Colorado. Davis Construction Co., Grand Junction, Colorado, was the low bidder, and the award should be made within three weeks.

The material suppliers were listed in each bid, and of the ten bidders, five specified Pacific States pipe; one, ACIPCO, and four, "To be approved by Engineer." Carrothers Construction Company, Paola, Kansas, was the firm listing ACIPCO. We did not have their name on our bidders' list, so we assume they did not have access to our prices.

I had a nice visit with Mr. Davis and Mr. Cofer, with Davis Construction Co., and I believe they will be interested in hauling the pipe on this job with their own trucks. They will not want to place an order until after the contract is awarded.

Very truly yours,

H. F. Kepner

HFK:ot

[Vol. 182]

EXHIBIT 5(e)

Form 189 Rev.

INTER-OFFICE MEMO

PACIFIC STATES CAST IRON PIPE COMPANY

FEB 20 8 49 AM '58
PSCIPCO

FROM Denver Office DATE February 18, 1958

TO Provo Office ATTENTION OF Mr. T. L. Johnson

SUBJECT SEWAGE DISPOSAL PLANT
PUEBLO, COLORADO
BID OPENING 27 FEBRUARY 1958

Dear Len:

Would you please send us prices and shipment to quote contractors for the following materials:

Approx.	1360 ft.	8" Class 150, ASA, Mechanical Joint Pipe
"	460 ft.	6" Ditto
"	32	Fittings
"	2	Valves

This job is an addition to the Pueblo Sewage Treatment Plant, and Si Elliot, Pueblo, Colorado, is doing the engineering.

Please figure truck shipment to Pueblo, Colorado.

Very truly yours,

H. F. Kepner

HFK:ot

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930 and June 15, 1941.)

3rd SHEET

2) **THIS MEMORANDUM** is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading nor a copy or duplicate covering the property named herein, and is intended solely for filing or record.

Shipper's No. 1a

Agent's No.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

at **IRONTON, UTAH** 30 April, 19 58

from **PACIFIC STATES CAST IRON PIPE CO.**

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to **Davis Const. Co.** (Mail or street address of consignee—For purposes of notification only)

Destination **Pueblo** State of **Colo.** County of

Route **Called** **GJ-15-11** **D-73565**

Class or Rate Car Initial Car No.

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)
13	4"x18'2" ASA 22 BT Pipe	3,693#
4	6"x18'2" ASA 22 BT EL Pipe	1,957
	TOTAL	5,650#

FRT. ALLOWED ON 5,650# @ $48.59

ORDER COMPLETE

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

[Fol. 185]

EXHIBIT 5 (d)

from **PACIFIC STATES CAST IRON PIPE CO.**

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to **Davis Const. Co.** (Mail or street address of consignee—For purposes of notification only)

Destination **Pueblo** State of **Colo.** County of

Route **Called** **CJ-15-11** **D-73565**

Class or Rate Car Initial Car No.

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)
13	4"x18'2" ASA 22 BT Pipe	3,693#
4	6"x18'2" ASA 22 BT EL Pipe	1,957
	TOTAL	5,650#

FRT. ALLOWED ON 5,650# @ $48.59

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

ORDER COMPLETE

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

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per

PACIFIC STATES CAST IRON PIPE CO., Shipper. Agent.

Per Per

Permanent postoffice address of Shipper PROVO, UTAH

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EXHIBIT 5(d)

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, carrying freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance. Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and bagging at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier. **Provided**, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published. **Provided**, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: **Provided**, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications of tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss of damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property, and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property, but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the (the last carrier making ultimate delivery).

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

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or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by, fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance. **Provided**, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary compress and bagging at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for its own convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: **Provided**, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: **Provided**, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: **Provided**, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance, it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property, but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignee (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property, and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property, but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignee shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

7306

Tallied by

Unit Truck

13 4" 18² A36 B & Cooler

4 4 18² A36 B & Cooler

1	293	1.71
2		1.54
3	86	44.2
4	6	4.73
5	7	OK
6		
7	5	1805
8	252	153
9	25	1951
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36.93 *

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4.70

18.05 *

[illegible]

February 23, 195[illegible]

[illegible]

Mr. D. E. Hanson

[illegible] PLANT
PUEBLO, COLORADO
CONTRACTORS' LETTING FEBRUARY 27, 195[illegible]

Please quote this job as follows:

[illegible]	[illegible]x18'	Class [illegible] O. Bell & Spigot, Tar Coated [illegible] Spec.	$[illegible].05 foot
450 feet	6 x18'	Ditto	2.00[illegible] foot
		Fittings and Valves	List less 15%

These prices are f.o.b. foundry with truck freight allowed to Pueblo.

Terms: Net cash thirty days.

Shipment could be made promptly upon receipt of an order.

Yours very truly,

Sales Manager

TLJ:l[illegible]

PACIFIC STATES CAST IRON PIPE CO.

INVOICE

cb

General Office and Foundries

P. O. Box 18, Provo, Utah

ORDER NO D-73565 -B
ORDER DATE April 15, 1958
31435-60

YOUR ORDER GJ-15-11
YOUR REQ

ORDER NO
INVOICE NO 29094
INVOICE DATE APR 30 58

CAR NO

SOLD TO Davis Construction Co.
P. O. Box 1786
Grand Junction, Colorado

SHIP TO Same: Sewage Disposal Plant
Pueblo, Colorado

ROUTE CALLED

RATE

R R DESTINATION

FINAL DESTINATION PUEBLO, COLORADO

F O B FOUNDRY WITH 17.20 N.T. FRT. ALLOWED

TERMS 30 DAYS NET

DESCRIPTION & QUANTITY ORDERED		QUANTITY SHIPPED PIECES	QUANTITY SHIPPED FEET	UNIT PRICE	AMOUNT
32 Pcs. 4"x18'2"	Class 150, BOLTITE MECHANICAL JOINT, TAR COATED, SUPER DELAVAUD Cast Iron Pipe. Fed. Spec. WW-P-421a. Wt. per Ft. 16.2#; Wt. per Length 291# 531'-4"	13	236'2"	1.403 FT.	331 34
31 Pcs. 6"x18'2"	Class 150, BOLTITE MECHANICAL JOINT, TAR COATED, SUPER DELAVAUD, Cast Iron Pipe. Fed. Spec. WW-P-421a, Wt. per ft. 25.5#; Wt. per Length 460#. 553' 2"	04	72'8"	2.083 FT.	151 37
					482 71
			LESS FRT. ON 5650#		48 59
					434 12
			2% COLO. TAX		8 68
					442 80
76 Pcs. 8"x18'2"	Class 150, BOLTITE MECHANICAL JOINT, TAR COATED, SUPER DELAVAUD Cast Iron Pipe. Fed. Spec. WW-P-421a. Wt. per ft. 36.4#; Wt. per length 655#. 1350' 8"				
2 Pcs. 4"	All Bell Tees, Boltite				
3 Pcs. 4"	All Bell 90 Degree Bends, Boltite				
1 Pc. 4"	All Bell 22½ Degree Bend, Boltite	DK 2½	434 12	10 85	
1 Pc. 6"	All Bell 90 Degree Bend, Boltite				
2 Pcs. 6"	All Bell 45 Degree Bends, Boltite				

(See Sheet No. 2)

EXHIBIT 5(e)

cb

General Office and Foundries

P. O. Box 18, Provo, Utah

ORDER NO D-73565 -B
ORDER DATE April 15, 1958
YOUR ORDER GJ-15-11
YOUR REQ 31435-60

ORDER NO
INVOICE NO 29094
INVOICE DATE APR 30 58

CAR NO

SOLD TO Davis Construction Co.
P. O. Box 1786
Grand Junction, Colorado

SHIP TO Same: Sewage Disposal Plant
Pueblo, Colorado

ROUTE CALLED

RATE

R R DESTINATION

FINAL DESTINATION PUEBLO, COLORADO

F O B FOUNDRY WITH 17.20 N.T. FRT. ALLOWED

TERMS 30 DAYS NET

DESCRIPTION & QUANTITY ORDERED		QUANTITY SHIPPED PIECES	QUANTITY SHIPPED FEET	UNIT PRICE	AMOUNT
32 Pcs. 4"x18'2"	Class 150, BOLTITE, MECHANICAL JOINT, TAR COATED, SUPER DELAVAUD Cast Iron Pipe. Fed. Spec. WW-P-421a. Wt. per Ft. 16.2#; Wt. per Length 294# 581'-2"	13	236'2"	1.403 FT.	331 34
31 Pcs. 6"x18'2"	Class 150; BOLTITE, MECHANICAL JOINT, TAR COATED, SUPER DELAVAUD, Cast Iron Pipe. Fed. Spec. WW-P-421a. Wt. per ft. 25.5#; Wt. per Length 460#. 563' 2"	04	72'8"	2.083 FT.	151 37
					482 71
			LESS FRT. ON 5650#		48 59
					434 12
			2% COLO. TAX		8 68
					442 80
76 Pcs. 8"x18'2"	Class 15., BOLTITE, MECHANICAL JOINT, TAR COATED, SUPER DELAVAUD Cast Iron Pipe. Fed. Spec. WW-P-421a. Wt. per [illegible] 36.4#; Wt. per length 655#. 1380'-8"				
2 Pcs. 4"	All Bell Tees, Bolt[illegible]				
9 Pcs. 4"	All Bell 90 Degree [illegible] Boltite				
1 Pc. 4"	All Bell 22½ Degree Bend. Boltite	DK 2½	434 12	10 85	
1 Pc. 6"	All Bell 90 Degree Bend. Boltite				
2 Pcs. 6"	All Bell 45 Degree Bends. Boltite				

(See Sheet No. 2)

TERMS AND CONDITIONS OF THIS SALE ARE PRINTED ON THE BACK OF THIS INVOICE, AND ARE MADE A PART HEREOF.
ALL CLAIMS FOR WHICH WE MAY BE RESPONSIBLE MUST BE MADE WITHIN 10 DAYS FROM RECEIPT OF SHIPMENT.
FREIGHT ALLOWANCE IS BASED ON RATE QUOTED. CONSIGNEE ASSUMES RISK IN PAYING ANY ADDITIONAL AMOUNT WITHOUT OUR AUTHORITY. IN ORDER FOR YOU TO COLLECT FOR LOSS OR DAMAGE IN TRANSIT, NOTATION MUST BE MADE BY FREIGHT AGENT ON PAID EXPENSE BILL. DEDUCTIONS FROM THIS INVOICE FOR LOSS OR DAMAGE CANNOT BE ALLOWED.
BY ORDER OF INTERSTATE COMMERCE COMMISSION, CARRIERS CANNOT PAY CLAIMS FOR LOSS OR DAMAGE UNLESS FILED WITH THEM WITHIN FOUR (4) MONTHS AFTER DELIVERY OF SHIPMENT, OR IN CASE OF FAILURE TO DELIVER, THEN WITHIN FOUR (4) MONTHS AFTER REASONABLE TIME FOR DELIVERY HAS ELAPSED.
We, the undersigned, do hereby guarantee that the articles or commodities listed herein were produced or manufactured in accordance with the Federal Child Labor Act of September 1, 1916.

PACIFIC STATES CAST IRON PIPE CO

[fol. 188]

EXHIBIT 5(e)

TERMS AND CONDITIONS

1—Quotations are for immediate acceptance only and subject to change without notice.

2—Agreements are contingent upon strikes, fires, accidents, car shortage, or any other causes beyond our control.

3—Shipping promises count from receipt at foundry of full manufacturing and shipping details; they are based upon present expectations but are not guaranteed. Material in stock is offered subject to prior sale.

4—Delivery is to be made F. O. B. seller's foundry, upon which seller's responsibility ceases.

5—Freight charges when included in the selling price, are to be paid by the buyer. Freight allowance is based on a specific rate to agreed destination and when shipments are forwarded freight collect the amount of freight is to be deducted by us on the face of the invoice. Consignee assumes the risk in paying any additional charges without our consent.

6—PAYMENT: Net cash in Provo, Utah, unless otherwise agreed in writing.

7—CLAIMS: All claims for corrections or deductions must be made within ten days after receipt of goods.
All material is rigidly tested and inspected at the foundry and is carefully loaded. Seller agrees to replace at agreed point of delivery any material proven defective, or, which does not conform to the specifications shown in the order placed in acceptance of this quotation.
The measure of the damage is the price of defective material only. No charge for labor or expense required to repair defective material, or for any consequential damages, will be allowed.
Claims for breakage or loss in transit must be filed with the carrier's agent promptly, as the Inter-State Commerce Commission prohibits carriers from paying loss or damage claims unless such claims are filed with them within four months after delivery date. It is impossible to collect for damaged or lost articles unless you have the original bill of lading and the original receipted freight bill with exception showing the loss or damage and signed by the carrier's agent. In case of damage by the carrier, we will, if desired, make claim on behalf of our customers, provided we are supplied with the necessary data to substantiate the claim.

8—When orders have been filled as specified, no goods may be returned, nor will any credit be allowed, unless our consent has first been secured, and all goods returned will, if accepted, be credited less the cost of handling and the freight and cartage expenses incurred.

9—All orders submitted to us through our division sales offices, sales agents, or direct to the general office by the buyer, must be subject to the approval of the Vice-President, Treasurer, or General Sales Manager of the Pacific States Cast Iron Pipe Company at Provo, Utah, for final acceptance.

10—Unless assented to by the proper official of our company, in writing, no terms or conditions at variance with, or in addition to, those indicated herein shall apply to any transaction resulting from this quotation.

PACIFIC STATES CAST IRON PIPE CO

[fol. 190]

PROCEEDINGS BEFORE THE STATE TAX COMMISSION OF UTAH

EXHIBIT 6(a)

TOWN OF FARMINGTON
NEW MEXICO

MUNICIPAL UTILITIES IMPROVEMENTS—1959—T

SPECIFICATIONS AND CONTRACT DOCUMENTS

[fol. 191]

SECTION III

CONTRACT

THIS AGREEMENT, made and entered into this the ..... day of ....., 19....., by and between the ....., acting herein through its ..... by its ....., Pary of the First Part, hereinafter called Owner, and ..... of the city of ..... County of ..... and State of ....., Party of the Second Part, herein called Contractor.

WITNESSETH: That for and in consideration of the payments hereinafter set forth to be made by the Owner; the Contractor hereby agrees with the Owner to commence and complete the construction of certain public works described as follows:

for the sum of ..... ($.....) the Contractor agrees to furnish and perform all work as required by the Notice to Bidders, Information to Bidders, Contractor's Proposal, General Conditions, Detailed Specifications, Special Conditions, Special Provisions if any, Plans, Prints, Contract, Performance Bond and any and all written explanations or interpretations thereof; all of which taken collectively constitute the Contract Documents as prepared or issued by W. Carlos Powell, Engineer, herein entitled the Engineer.

The Contractor hereby agrees to commence work under this Contract on a date to be specified in a written work order of the Owner's Engineer and to complete fully all work thereunder within 365 consecutive calendar days thereafter. The Contractor further agrees to pay, as liquidated damages, the sum of none for each consecutive calendar days thereafter as provided for in the Contract Documents.

[fol. 192] The Owner agrees to pay the Contractor in current funds for the performance of the Contract in accordance with the accepted Proposal therefor, subject to additions and deductions, and full compensation to be paid the Contractor by the Owner shall be payable as provided in the General and Special Conditions of the Contract Documents.

It is hereby mutually agreed by and between the parties hereto that no contractor, subcontractor, material-man, vendee, laborer, mechanic, or other person can or will contract for or in any other manner have or acquire any lien upon the building or works covered by this Contract, or the land upon which the same is situated.

IN WITNESS WHEREOF the parties to these presents have executed this Contract in three counterparts, each of which shall be deemed an original, in the year and day first above written.

(SEAL)

.....

Party of the First Part (Owner)

by .....

Mayor

.....

Attest:

.....

Clerk

.....

.....

Party of the Second Part (Contractor

by* .....

.....

.....

Title

.....

* Attach evidence of authority to execute the Contract on behalf of the company, if a corporation, and names and addresses of treasurer and secretary.

* * * * * * *

[fol. 193]

SECTION IV

GENERAL CONDITIONS

* * * * * * *

5. *Payment of Employees.* In the payment of employees the Contractor and any and all subcontractors shall comply with the current minimum wage scale as published by the Labor Commission of the State of New Mexico, a copy of which is appended to these General Conditions (Section IV).

The Contractor and each of his subcontractors shall pay each of his employees engaged in work on the Project under this Contract in full (less deductions made mandatory by law) in cash, and not less often than once each week. The Owner may give permission to pay by check if the employees are in no way inconvenienced or caused to pay for cashing checks.

6. *License or Royalty Fees.* The Contractor shall be responsible for all license or royalty fees paid in connection with this Contract and shall release the Owner from any claims for any process used or materials or equipment furnished or used in the Work or the Project.

7. *Commencement and Completion of Work.* The Contractor shall commence work under this Contract on a date to be specified in a written order of the Owner and shall fully complete all work thereunder within the number of

consecutive calendar days stated in the Contract. If the work is not completed within the specified period, for each consecutive day thereafter required to complete the work the Contractor shall pay, as liquidated damages, the amount specified in the Contract.

8. Payments to Contractor.

(a) Not later than the 15th day of each calendar month the Owner will make a partial payment to the Contractor on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month under this Contract; but to insure the proper performance of this Contract, the Owner shall retain ten per cent (10%) of the amount of each estimate until final completion and acceptance of the work covered by this Contract: *Provided,* that the Owner, at any time after fifty per cent (50%) of the work has been completed, if it finds that satisfactory progress is being made, may make any of the remaining partial payments in full: *Provided*, further, that on completion and acceptance of each separate building, public work, or other division of the Contract, on which the price is stated separately in the Contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

. . . . . .

[fol. 194]

DETAIL SPECIFICATIONS

GENERAL

1. Scope. WATER AND SEWER IMPROVEMENTS 1959-T will consist of water distribution lines, sanitary sewage collection lines, and other appurtenant work.

2. Location. The location of the work will be as shown on the Plans, and will be on public streets or on property owned or controlled by the Owner. However, the Owner reserves the right to delete certain lines or work and make substitutions therefore.

3. Drawings. The work shall conform to the accompanying set of Plans, dated July, 1959, which are a part of these Specifications. These Plans may be modified either prior to or during construction at the discretion of the Engineer,

in order to improve or facilitate the construction or to overcome unforeseen obstacles encountered.

4. *Quantities.* Items and quantities in the Proposal Schedule conform only to the extent of the work shown on the Drawings. The Owner hereby reserves the right to increase or decrease quantities from those shown in the Proposal Schedule. If quantities are increased, the completion date may be advanced as mutually agreed upon by the Owner and Contractor.

5. *Materials and Equipment.* Before ordering materials or equipment, the Contractor shall submit to the Engineer, for his approval, any drawings, specifications, test results and any other data or information necessary for the Engineer to determine whether the proposed material or equipment will be acceptable. Such approval shall not relieve the Contractor of his responsibility regarding the replacement or repair of defective or faulty items or their failure to meet the specified requirements.

6. *Lines and Grades.* The Engineer will furnish the Contractor with centerline location stakes and a benchmark for structures, and offset line and grade stakes at half stations for sewer pipe lines, the protection of which shall be the Contractor's responsibility, and any replacements shall be at the Contractor's expense. The Contractor shall set any additional line or grade stakes he may require. These stakes may be checked by the Engineer at any time, and if a check is requested by the Contractor he shall give the Engineer reasonable notice. The Contractor shall be responsible for constructing to the lines and grades furnished.

7. *Interference with Utilities.* Any interference with, or damage to, either underground or aboveground utilities of [fol. 195] any nature shall be the Contractor's legal and financial responsibility, saving the Owner harmless from any or all claims resulting from damage to these utilities by reason of his operations incidental to the work under this Contract.

8. *Fences.* The Contractor shall replace in good and acceptable condition all fences and parts thereof removed, and shall maintain completely the effectiveness of fences

during the progress of the work and in every instance save harmless the Owner from any damages that might result in connection with the work on private property of any character whatsoever.

9. Protection of Livestock. The Contractor shall take all necessary precautions to protect livestock from injury or damage as a result of his operations in connection with this project, and shall save the Owner harmless from any claims that might result from the work.

10. Excavation and Backfill. All excavation and backfill for structures, piping, etc., shall be included in the unit price bid for the item under which such excavation and/or backfill is required. Excess or rejected excavated material will be disposed of within the corporate limits of the Town as directed by the Engineer.

Excavation shall be carried only to such limits as may be required to perform the work properly. The excavation, or disturbance, of soil beyond the above-mentioned limits shall be the responsibility of the Contractor, and he will be required to correct such conditions to the extent that the area is restored to its original condition. It is to be understood that the foregoing is also intended to apply to any injurious effects sustained from water resulting from operations of the Contractor in performing work under this Contract.

Backfilling of all pipe lines, structures, or other excavations shall be performed as follows:

Pipe Lines—After inspection and approval of the pipe line, select material from the site, containing no particle exceeding two (2") inches in the maximum dimension, shall be placed in successive layers, not exceeding six (6") inches in depth, under, around and over the pipe to the dimensions and depths shown on the typical trench sections shown on the Plans for the type of pipe being installed. Each layer shall be thoroughly compacted to ninety (90%) per cent of the maximum dry density as determined by the modified Proctor test. The balance of the backfill shall be similarly placed and compacted, using acceptable site material provided no particle exceeds six (6") inches in the maximum dimension.

[fol. 196]

Cast Iron Pipe and Fittings

1. Scope. This specification covers the furnishing and installing of cast iron pipe and fittings at the locations and in the manner indicated on the drawings.

2. Cast Iron Pipe. All cast iron pipe furnished shall be new and the pipe barrel shall conform to all of the requirements of Federal Specification WW-P-421a. Unless otherwise indicated, all pipe and joints shall be coated and lined in accordance with Federal Specification WW-P-421a. Lining shall be half-thickness cement-mortar.

3. Joints. Cast iron pipe joints shall be as indicated on the drawings or in the proposal schedule and shall be one of the following: Bell and spigot, (calked joint, roll-on-joint or mechanical joint), flanged or plain end. Bell and spigot joints shall conform to the requirements of Federal Specification WW-P-421a. Flanged joints shall be of the screwed-on flange type. Flanges and drilling shall be in accordance with American Standards Association Class 125, B16.1-1948. Flanges shall be tightly screwed on, the threaded end of the pipe until the pipe barrel project beyond the face of the flange, after which the face of the flange and the pipe end shall be faced to give a flush surface.

All flange bolts and nuts, unless otherwise specified, shall be made of the best quality refined iron or mild steel, and shall have sound, well fitting threads. Bolts shall be provided with standard hexagonal cold-pressed nuts and standard hexagonal heads. Flange bolts for each size of flanges shall be of the diameter required, and of such a length that, after installation, they will not project more than three-eighths (3/8") inch or less than one-eighth (1/8") inch beyond the outer face of the nut.

Gaskets of "Cranite" or equal, one-sixteenth (1/16") inch thick shall be used in all flanged joints.

4. Fittings. The body of all fittings or specials furnished shall meet the requirements of A.W.W.A. for Class D fittings. Fitting ends shall suit the ends of the pipe being

joined, unless otherwise indicated, and shall meet the same requirements as for pipe joints.

5. Delivery and Handling. All pipe and fittings shall be manufactured, handled, loaded and shipped in such a manner that they will be delivered undamaged, in sound condition, and conforming in all respects to these Specifications. Care shall be taken in loading and handling the pipe not to injure the pipe coating. No other pipe or materials of any kind shall be placed inside any pipe or fitting after the coating has been applied and prior to installation.

[fol. 197] *6. Trenching.* The excavation wherein all pipe is to be installed shall be at a depth sufficient to permit the minimum coverage indicated by the Plans. The excavation shall be of open-cut and of sufficient width to receive the pipe properly and provide ample working space, which shall be not less than six (6") inches clear on each side of the pipe. Sheeting approved by the Engineer shall be required where it is deemed necessary to prevent caving and shall be removed after the pipe has been installed and tested in the trench.

7. Laying Cast Iron Pipe. The Engineer must be notified when pipe is laid in any trench and all such pipe, prior to being installed, must be inspected by the Engineer or his duly authorized representative.

Pipe shall be laid on a firm bed in conformance with the Plans, and to lines and grades furnished. Bottom of trench is to be excavated in such a manner as to permit a solid bearing for each and every length of pipe. Under and around each joint, sufficient enlargement to facilitate full length bearing is required.

Any adjustments which may be required in the line or grade shall be done by scraping away the earth or filling in with the proper material and firmly tamping same, whichever may be necessary, under the bottom of the pipe. In no event will blocking or wedging be permitted. All openings along the pipe line must be secured with suitable stoppers placed at the end of each pipe whenever

the work is temporarily stopped, in order to prevent foreign materials from entering the pipe.

Walking or working over pipe will not be permitted except as may be necessary in refilling and tamping, until such pipe is covered with at least six (6") inches of backfill. Pipe laying shall commence at such point or points as may be directed by the Engineer and carried on thereafter under his supervision.

8. *Joining.* All joints of bell and spigot calked joint cast iron pipe and specials must admit at least the thickness of one-quarter (1/4") inch of lead all around for the entire length and circumference of the joint. In the making of joints the spigot end of the pipe shall be accurately fitted into the bell and concentric with it. If any of the pipe does not allow sufficient space between the outside of the spigot and the inside of the bell for proper calking, it shall be replaced by one of the proper dimensions. A careful inspection of the bell and socket shall be made and any particles of dirt of foreign matter shall be excluded therefrom. Dry Yarn, Oakum, or Braided Hemp, free from oil, shall be thoroughly calked into the bell for approximately one-sixth (1/6) the length of the bell socket. The remaining space shall then be filled with the best quality of soft American pig lead, molten, at one pouring. Lead will then be upset with a calking tool and driven until there is no further give to it.

[fol. 198] All joints of bell and spigot roll-on and mechanical joint cast iron pipe shall be made in accordance with the manufacturer's recommendations.

Flanged joints shall be firmly bolted after first inserting the gasket between the faces of the flanges.

9. *Backfilling.* Backfilling of the trench in which the pipe is laid shall commence as soon as the Engineer may direct. The space around the pipe and to a depth of six (6") inches over the pipe shall be filled with selected material, free from rocks, stones or debris, evenly and firmly tamped. Care shall be taken during backfilling operations to prevent damage to the pipe or coating. Pipe joints shall not be backfilled until the line has been tested.

In the event that excavation does not furnish suitable material to make the fill, the Contractor will be required to furnish enough material from some other source to provide that required. No joint may be backfilled until after the line has been tested.

Complete backfilling of the trench and cleaning of streets, highways, and thoroughfares must not—at any time during the progress of the work, unless otherwise authorized by the Engineer—be further than 1,000 feet back of the point to which the pipe lines has been completed.

After the trench has been refilled, all debris of whatever nature, character, or material of any description deposited by the Contractor along the line of the work or the right-of-way shall be cleaned and disposed of and the surface restored to the same condition as it was before the work commenced. Such material shall be deposited and disposed of as directed by the Engineer.

10. Tests for Cast Iron Pipe. Each piece of pipe shall bear the manufacturer's identification and shall be certified by the manufacturer to have met the requirements of the governing specification. Each piece shall be visually inspected in the field for specification conformance and, at the discretion of the Engineer, the Contractor may be required to furnish certificates of tests as set forth in the Federal Specifications WW-P-421a, by an independent laboratory.

After installation the pipe shall be tested in sections not exceeding 1,000 feet, under hydraulic pressure of at least 150 pounds per square inch, to be maintained for at least a two (2) hour period; the Contractor shall make the test and furnish all fittings and testing apparatus. The Engineer shall be notified prior to making of such tests and such tested sections shall be approved by the Engineer. Any pipe, or coupling showing sweat or leaks will have to be made tight in a manner satisfactory to the Engineer.

[fol. 199] Where pipe lines are bedded in concrete, testing shall be done prior to placing of the concrete covering.

Before putting into service all new water lines shall be thoroughly flushed and then chlorinated as specified in

"Sterilization of Water Lines". Chlorine and testing equipment shall be furnished by the Contractor and the chlorination will be supervised by the Engineer.

11. Method of Payment. Payment under this item will be based on the actual number of feet of pipe installed at the unit price bid. Measurements will not include the distance between hub or flange ends of valves, fittings or specials.

Cast iron fittings shall be paid for at the unit price bid per pound in the proposal for the total quantity of fittings installed.

Where the Specifications definitely state, or it is indicated that the furnishing, laying, fabricating, backfilling, etc., of cast iron pipe and for fittings shall be included in another or lump-sum item, then the above method of payment shall not be applicable.

[fol. 200]

Valves, Hydrants and Boxes

1. Scope. Under this item shall be included all valves, hydrants, valve boxes, labor and materials required for the furnishing and setting, by the Contractor, of such items that may be shown on the Plans and/or in the Specifications.

2. Gate Valves. Gate valves shall be IBBM of the size designated on the Plans and shall conform to American Water Works Association standards for operating under 150 pounds of working pressure. Valves will be of the end type indicated by the drawings on the Proposal, and will be non-rising stem, left opening, double-disc, parallel seat type, designed to work equally well with pressure on either side of the gate. The Contractor may be required to furnish certificates of water pressure tests of not less than 300 pounds with the manufacturer's guarantee for the rating indicated.

3. Valve Boxes. Valve boxes shall be of the slip adjustment, five-and-one-fourth (5¼) inch shaft, oval base type, suitable for the size of valve and depth of pipe bury indicated by the Plans.

The boxes shall be so placed, in a vertical position, that the barrel of the box will align with the operating nut

of the valve. The top of the box shall be flush with the finished grade of the street.

For the installation of boxes in unpaved streets, a concrete block two (2′) feet square and six (6″) inches thick shall be poured around, and flush with, the top of the box.

The boxes are to be of cast iron with cast iron covers marked WATER, sufficiently strong to withstand heavy traffic.

4. *Hydrants.* Hydrants shall conform to the American Water Works Association standards, designed to hold safely a working pressure of 150 pounds per square inch with a safety factor of at least five at the working pressure. Hydrant end-connections shall be as indicated on the Plans.

Hydrants may be either of the compression or gate type and the valve when shut must remain tight when the upper portion of the barrel is broken off. The pitch of the stem thread shall be such that water hammer will not exceed the working pressure when such is over sixty (60) pounds or be above sixty pounds when the working pressure is less.

When the hydrant is discharging 250 gallons per minute from each two-and-one-half-inch (2½″) outlet, the total friction loss of the hydrant shall not exceed two (2) pounds for two-way, three (3) pounds for three-way, and four (4) [fol. 201] pounds for four-way hydrants.

A non-corrodible drip vent shall be located to assure complete drainage of the barrel when the main valve is closed.

The main valve shall be faced with rubber or leather for the compression type or a bronze ring for the gate type, with a seat of bronze or other suitable material. Valve opening shall be five and one-quarter (5¼″) inches.

The outlets shall consist of two (2) two-and-one-half (2½″) inch hose and one (1) four-and-one-half (4½″) inch steamer nozzles. These nozzles shall be of brass, either threaded and pinned or locked and calked into the barrel casting. All nozzle threads shall be National Standard unless otherwise indicated on the Plans.

5. *Method of Payment.* Payment will be made for each hydrant and each valve and box installed complete at the

unit price bid, and shall include all the necessary labor, materials, equipment, and other expenses incidental to the installation.

[fol. 202]

Cutting-In Valves and Fittings

1. Scope. Under this specification will be included all the material and labor necessary for installing valves and fittings in existing pipe lines at the locations shown on the Plans. The Contractor shall submit to the Engineer, for his approval, his proposed method and list of materials for this work.

This specification is not intended to include connections made to extend water mains where there are existing valves or fittings available.

2. Materials. All materials used shall meet the applicable specifications found elsewhere herein for the material or equipment used.

3. Workmanship. The workmanship on cutting-in valves and fittings shall be comparable to that required for similar work under these Specifications and the progress of the work shall be so planned that a minimum interruption of service will occur.

4. Method of Payment. This item will be a lump sum bid for the installation of each valve or fitting, including only the pipe cutting and other incidentals necessary to the placing of the valve or fitting, in addition to the requirements of a normal installation.

[fol. 203]

Pressure Reducing Valves

1. Scope. This item will cover the furnishing and installing of pressure reducing valves with two flange and spigot fittings, of the size and at the locations shown on the Plans or as directed by the Engineer in the field.

2. Pressure Reducing Valve. The pressure reducing valve shall be Clayton No. 90, or approved equal, of the size shown on the Plans or as directed by the Engineer in the

field. The downstream pressure range shall be adjustable from 30 to 110 psi. It shall be iron body, bronze mounted with flanged ends, designed for 175 psi working pressure.

3. Flange and Spigot Fittings. Flange and spigot fitting shall be of the same size as the valve, with matching flanges. They shall be thirty-six (36") inches long and the wall thickness of the pipe section shall be the same as for cast iron pipe fittings specified under "Cast Iron Pipe and Fittings". The spigot end shall be suitable for the type of joint being used.

4. Installation. The valve shall be installed as shown on the Plans and in accordance with the manufacturer's recommendations. It will be housed in a standard manhole with traffic weight frame and cover meeting the specification "Manholes".

5. Method of Payment. Payment for pressure reducing valves will be made at the unit price bid in the Proposal Schedule for the actual number of valves installed, and shall include the flange and spigot fittings and manhole.

[fol. 204]

Pressure Relief Valve

1. Scope. This item will cover the furnishing and installing of pressure relief valves with two flange and spigot fittings, of the size and at the locations shown on the Plans or as directed by the Engineer in the field.

2. Pressure Relief Valve. The pressure relief valve shall be Clayton No. 50, or approved equal, of the size shown on the Plans or as directed by the Engineer in the field. The relief pressure range shall be adjustable from 20 to 80 psi. It shall be iron body, bronze mounted, with flanged ends, designed for 150 psi working pressure.

3. Flange and Spigot Fittings. Flange and spigot fittings shall be of the same size as the valve, with matching flanges. They shall be thirty-six (36") inches long and the wall thickness of the pipe section shall be the same as for cast iron pipe fittings specified under "Cast Iron Pipe and

Fittings". The spigot end shall be suitable for the type of joint being used.

4. *Installation.* The valve shall be installed as shown on the Plans and in accordance with the manufacturer's recommendations. The valve will be housed in a standard manhole with traffic weight frame and cover meeting the specification "Manholes".

5. *Method of Payment.* Payment for pressure relief valves will be made at the unit price bid in the Proposal Schedule for the actual number of valves installed, and shall include the flange and spigot fittings and manhole.

. . . . . .

[fol. 205]

CAST IRON SEWER LINES

1. *Scope.* This item will cover the construction of cast iron pipe sewer lines at the locations shown on the drawings.

2. *Cast Iron Pipe.* Cast iron pipe shall meet the requirements of the specification "Cast Iron Pipe and Fittings", and shall be furnished with mechanical joint ends.

3. *Location.* Cast iron pipe sewer lines shall be located as shown on the drawings or as directed by the engineer in the field.

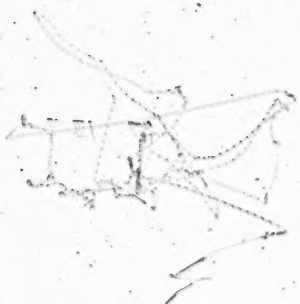
4. *Installation.* Installation of cast iron pipe sewer lines shall conform to the specification "Cast Iron Pipe and Fittings", except it shall be laid to line and grade.

5. *Method of Payment.* Cast iron pipe sewer lines shall be paid for at the unit price bid in the Proposal Schedule, which shall include all materials, labor, equipment and incidentals required for a complete installation.

[fol. 206]

EXHIBIT 6(b)

(See opposite) ☞



PACIFIC STATES CAST IRON PIPE CO.

MONARCH PACIFIC STATES MECHANICAL JOINT AND SPIGOT PRESSURE PIPE · GATE VALVES · FIRE HYDRANTS

General Office and Foundries
P. O. Box 18, Provo, Utah

DANA E. KEPNER
District Manager

550 Alcott Street
Telephone AMherst 6-3377
DENVER 4, COLORADO

July 31, 959

Quotation No. D59-232

To Contractors Bidding on
Subject Job

Gentlemen:

SUBJECT: MUNICIPAL UTILITIES IMPROVEMENTS - 1959
FARMINGTON, NEW MEXICO

BID OPENING: 10:00 A.M.
August 4, 1959

WE ARE PLEASED TO QUOTE YOU ON MATERIALS SET FORTH BELOW CONFORMING TO SPECIFICATIONS IN OUR CATALOG AND SUBJECT TO THE TERMS AND CONDITIONS AS MENTIONED ON THE BACK OF THIS SHEET AND HEREBY MADE A PART HEREOF ON THIS PROPOSAL, EXCEPT AS HEREINAFTER MODIFIED:

Pacific States Super de Lavaud, Tyton Joint, Class 150, Fed. Spec. WW-P-421a, thin cement lined seal coated, cast iron pipe in 18' laying lengths for water service:

Approx.	14,000 ft. of 4-inch Pipe,	~~$1.385~~ per foot	1.36
"	25,200 ft. of 6-inch Pipe,	~~2.07~~ " "	2.03
"	15,200 ft. of 8-inch Pipe,	~~2.94~~ " "	2.88
"	1,000 ft. of 10-inch Pipe,	~~3.875~~ " "	3.80
"	1,000 ft. of 12-inch Pipe,	~~4.97~~ " "	4.875

Pacific States AWWA Standard, Class 250, Mechanical Joint, tar coated cast iron water pipe fittings:

Approx. 40,000 lbs. Cast Iron Fittings, $0.225 per pound
(Based on weights in enclosed catalog)

Pacific States List 4, AWWA Standard, iron body, bronze mounted, non-rising stem, Mechanical Joint Gate Valves with 5¼" Slip Type Valve Boxes (3 Piece) with base:

30 Pcs.	4",	Gate Valves w/P1118CC Valve Box	$54.06 ea.
40 "	6",	Gate Valves w/P1118C " "	74.83 "
15 "	8",	Gate Valves w/P1118B " "	106.04 "
2 "	10",	Gate Valves w/P1118A " "	159.24 "
2 "	12",	Gate Valves w/P1118A " "	202.85

(Continued on Sheet No. 2)

TERMS AND CONDITIONS

1—Quotations are for immediate acceptance only and subject to change without notice.

2—Agreements are contingent upon strikes, fires, accidents, car shortage, or any other causes beyond our control.

3—Shipping promises count from receipt at foundry of full manufacturing and shipping details; they are based upon present expectations but are not guaranteed. Material in stock is offered subject to prior sale.

4—Delivery is to be made F. O. B. seller's foundry, upon which seller's responsibility ceases.

5—Freight charges when included in the selling price, are to be paid by the buyer. Freight allowance is based on a specific rate to agreed destination and when shipments are forwarded freight collect the amount of freight is to be deducted by us on the face of the invoice. Consignee assumes the risk in paying any additional charges without our consent.

6—PAYMENT: Net cash in Provo, Utah, unless otherwise agreed in writing.

7—CLAIMS: All claims for correction or deductions must be made within ten days after receipt of goods.
All material is rigidly tested and inspected at the foundry and is carefully loaded. Seller agrees to replace at agreed point of delivery any material proven defective, or which does not conform to the specifications shown in the order placed in acceptance of this quotation.
The measure of the damage is the price of defective material only. No charge for labor or expense required to repair defective material, or for any consequential damages, will be allowed.
Claims for breakage or loss in transit must be filed with the carrier's agent promptly, as the Inter-State Commerce Commission prohibits carriers from paying loss or damage claims unless such claims are filed with them within four months after delivery date. It is impossible to collect for damaged or lost articles unless you have the original bill of lading and the original receipted freight bill with exception showing the loss or damage and signed by the carrier's agent. In case of damage by the carrier, we will, if desired, make claim on behalf of our customers, provided we are supplied with the necessary data to substantiate the claim.

8—When orders have been filled as specified, no goods may be returned, nor will any credit be allowed, unless our consent has first been secured, and all goods returned will, if accepted, be credited less the cost of handling and the freight and cartage expenses incurred.

9—All orders submitted to us through our division sales offices, sales agents, or direct to the general office by the buyer, must be subject to the approval of the Vice-President, Treasurer, or General Sales Manager of the Pacific States Cast Iron Pipe Company at Provo, Utah, for final acceptance.

10—Unless assented to by the proper official of our company, in writing, no terms or conditions at variance with, or in addition to, those indicated herein shall apply to any transaction resulting from this quotation.

PACIFIC STATES CAST IRON PIPE CO

Pacific States AWWA Standard Fire Hydrants with 5' main valve, 6" Mechanical Joint inlet, 2-2½" Hose Nozzles, 1-4½" Steamer Connection for 4' trench depth:
40 Pcs. Fire Hydrants (City of Farmington Standard), ~~$169.09~~ $165.00 ea.

The prices quoted herein on Mechanical Joint items include all necessary glands, gaskets and bolts.

The prices quoted on Tyton Joint Pipe include all necessary gaskets and lubricant. Tyton installation tools can be furnished at a nominal charge which will be credited upon return of tools in good condition.

The prices quoted herein are f.o.b. our Foundry at Ironton (Provo), Utah with full truckload freight allowed to Farmington, New Mexico; therefore these are delivered prices. Should you desire to haul this material from our foundry at Provo, Utah, we will allow $20.40 per net ton, which is the current freight rate.

Truckload freight is limited to destinations to which the rate mentioned is applicable and to terrain where standard tractor and semitrailer can operate without difficulty, customer to unload per requirements of carrier. Your particular attention is called to the necessity of unloading the truck during four working hours after its arrival, under normal conditions, to avoid extra charges. Mechanical equipment must be furnished and operated by the customer for unloading pipe larger than 6-inch.

Terms are net 30 days from date of invoice, subject to acceptance of customer's credit by our Accounting Department.

Shipment can be made within approximately 2 to 4 weeks after receipt of order, or signed, accepted copy of this proposal.

We sincerely hope that these prices are attractive to you. These are the same prices quoted for last year's contract, and with costs almost certain to increase, our year's guarantee of these prices should make them very competitive.

MES:o

There are no agreements or verbal understandings outside of this proposal. The foregoing shall become a contract agreement only when accepted by you as purchaser and approved in writing by an executive officer of our company at our home office at Provo, Utah. And subject to the Terms and Conditions printed on the back of the first sheet of this quotation.

PACIFIC STATES CAST IRON PIPE COMPANY

By M. E. Stager
Sales Office

The prices quoted herein are f.c.b. our Foundry at Ironton (Provo), Utah with full truckload freight allowed to Farmington, New Mexico: therefore these are delivered prices. Should you desire to haul this material from our foundry at Provo, Utah, we will allow $20.40 per net ton, which is the current freight rate.

Truckload freight is limited to destinations to which the rate mentioned is applicable and to terrain where standard tractor and semitrailer can operate without difficulty, customer to unload per requirements of carrier. Your particular attention is called to the necessity of unloading the truck during four working hours after its arrival, under normal conditions, to avoid extra charges. Mechanical equipment must be furnished and operated by the customer for unloading pipe larger than 6-inch.

Terms are net 30 days from date of invoice, subject to acceptance of customer's credit by our Accounting Department.

Shipment can be made within approximately 2 to 4 weeks after receipt of order, or signed, accepted copy of this proposal.

We sincerely hope that these prices are attractive to you. These are the same prices quoted for last year's contract, and with costs almost certain to increase, our year's guarantee of these prices should make them very competitive.

MBS:o

There are no agreements or verbal understandings outside of this proposal. The foregoing shall become a contract agreement only when accepted by you as purchaser and approved in writing by an executive officer of our company at our home office at Provo, Utah. And subject to the Terms and Conditions printed on the back of the first sheet of this quotation.

PACIFIC STATES CAST IRON PIPE COMPANY

By M. E. Stager
Sales Office

To the PACIFIC STATES CAST IRON PIPE CO.:

Your proposal as above is hereby accepted this

4 day of Aug. 1953

San Juan Basin Const. Co.

By: Jas. Powell Pres.
(Title)

APPROVED AT PROVO, UTAH, this

day of 19

By:
Vice-President and Treasurer

EXHIBIT 6(c)

W. CARLOS POWELL
Engineer

SANTA FE, NEW MEXICO
9 Radio Plaza
Phone YUcca 3-7427

Santa Fe, New Mexico
June 10, 1959

FARMINGTON, NEW MEXICO
417 East Main Street
Phone DAvis 5-6412

Pacific States Cast Iron Pipe Company
550 Alcott Street
Denver 4, Colorado

Attention: Mr. H. F. Kepner

File:
Re: Annual Utility Contract
Farmington, New Mexico

Dear Hal:

Glad to see that you are still interested in furnishing cast iron pipe on our various projects in New Mexico.

This particular Contract in Farmington is in the course of preparation, but I doubt that we will be ready to issue Plans and Specifications for another ten (10) days. You are definitly on our list to be advised.

Very truly yours,

W. CARLOS POWELL, ENGINEER

By: Thomas J. Eaton

TJE:lg

RECEIVED
DANA KEPNER CO.
JUN 12 1959

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	MJJ	
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20.

Plan Holders

Town of Farmington, N. M.
Municipal Utilities Improvements
1959-T

Burn Construction Company
Box 1111
Las Cruces, New Mexico

Riverside Corporation
114 N. Cochiti
Farmington, New Mexico

San Juan Basin Construction Company
Box 2116
Farmington, New Mexico

E. M. Silver
Box 1062
Albuquerque, N. M.

D. W. Falls, Inc.
Box 95
Albuquerque, N. M.

Northwestern Engineering Company
Box 567
Denver, Colorado

Refinery Engineering Company
Box 1558
Tulsa, Oklahoma

Clowe and Cowan
Box 89[illegible]
Roswell, New Mexico

C. R. Davis Construction Company
1000 Manuel Avenue, SE
Albuquerque, New Mexico

RECEIVED
DA[illegible] CO.
JUL 3 1 1959
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C.
HM
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[Vol. 210]

DATE: 22 July 1959

Las Cruces, New Mexico
Phone JA 6-2465

GENTLEMEN:

We are planning on submitting a proposal for MUNICIPAL UTILITIES IMPROVEMENTS-1959-T, BEING LET AT FARMINGTON, NEW MEXICO 4 AUGUST 1959.

Plans are available from W. CARLOS POWELL, 126 NORTH CASTILLO, SANTA FE, NEW MEXICO.

We solicit your quotation for the materials required. It will be necessary to have your quotation not later than 1 AUGUST 1959. Please complete and return the attached card at your earliest convenience.

BURN CONSTRUCTION COMPANY, INC.
BY: M. Bluethman

Telefax WESTERN UNION Telefax

LAUC4

L AYB032 PD=ALBUQUERQUE NMEX 29 940AM= 1959 JUL 29 AM 9 5

PACIFIC STATES CAST IRON PIPE CO=

550 ALCOTT ST DVR=

REQUEST QUOTATION CAST IRON WATER AND SEWER PIPE FOR FARMINGTON MUNICIPAL IMPROVEMENT PROJECT 1959T=

D W FALLS INC R E DEBOLT= 10454

(Uniform Domestic Straight Bill of Lading adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930 and June 15, 1941.)

3rd SHEET

THIS MEMORANDUM is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading nor a copy or duplicate covering the property named herein, and is intended solely for filing or record.

Shipper's No.

Agent's No.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

at **IRONTON, UTAH** 4 Dec. ,19 59

from **PACIFIC STATES CAST IRON PIPE CO.**

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to San Juan Basin Const., Inc., (City of Farmington Job)

Destination Farmington State of New Mex. County of

Route Called 3942 D-7972 NONE

Class or Rate Car Initial Car No.

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)
78	4"x18' ASA 72 Tyton Joint EL Pipe	24,514
33	6"x18' ASA 72 Tyton Joint EL Pipe	16,172
78	4" Tyton Gaskets	24
33	6" Tyton Gaskets	16
2	Qts. Lu.	4
	TOTAL	40,730.

ORDER COMPLETE

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced

$

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

[fol. 212]

EXHIBIT 6(d)

at IRONTON, UTAH 10822 4 Dec. 1959

from **PACIFIC STATES CAST IRON PIPE CO.**

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to San Juan Basin Const., Inc., (City of Farmington Jol)

Destination Farmington State of New Mex. County of

Route Called 342 D-79721 ~~NONE~~

Class or Rate Car Initial Car No.

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)
78	4"x18' ASA 72 Tyton Joint EL Pipe	24,514
33	6"x18' ASA 72 Tyton Joint EL Pipe	16,172
78	4" Tyton Gaskets	24
33	6" Tyton Gaskets	16
2	Qts. Lu.	4
	TOTAL	40,730.

ORDER COMPLETE

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

Per

PACIFIC STATES CAST IRON PIPE CO. Shipper

Per

Agent

Per

Permanent postoffice address of Shipper PROVO, UTAH

3

FRT. ALLOWED ON 40,730 #$415.45

99999

10M 8-57 BARCO

[fol. 212]

EXHIBIT 6(d)

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for ordinary damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train of vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance. **Provided**, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: **Provided**, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned; or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: **Provided**, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: **Provided**, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels; and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges: Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery or which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

[fol. 213]

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: **Provided**, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage, and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: **Provided**, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order, notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: **Provided**, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: **Provided**, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges: Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified, in writing, the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Tallied by

98 - 4" X18" ASA 22 TYTON JOINT EL (66 FRONT)

33 6" X18" ASA 22 TYTON JOINT CL

1	293	288	443
2	294	287	454
3	280	286	451
4	291	293	447
5	295	282	450
6	284	287	464
7	287	286	470
8	286	288	454
9	285	283	446
10	292	278	440
11	283	280	466
12	282	294	465
13	284	280	461
14	278	282	458
15	281	278	448
16	285	286	443
17	282	282	445
18	280	276	445
19	293	280	450
20	285	286	457
21	288	285	452
22	320	281	464
23	322	278	465
24	317	295	470
25	318	288	453
26	320	284	453
27	316	282	466
28	310	280	438
29	315		446
30	324		445
31	283	22,564	465
32	282	1950	463
33	278	24,614	465
34	285		
35	286		
36	288		14,918
37	287		1259
38	288		16,172
39	295		
40	290		
41	289		
42	280		
43	295		
44	282		
45	281		
46	288		
47	287		
48	320		
49	283		
50	283		

463
465
149.18

440

SAN JUAN BASIN TRUCK

[fol. 214]

EXHIBIT 6(e)

PACIFIC STATES CAST IRON PIPE CO.

INVOICE

MANUFACTURERS OF MECHANICAL JOINT • BELL AND SPIGOT PRESSURE PIPE • GATE VALVES • FIRE HYDRANTS

General Office and Foundries 18½T P. O. Box 18, Provo, Utah

or

ORDER NO D-79721-A
ORDER DATE Dec. 8, 1959
YOUR ORDER 3942
YOUR REQ.

ORDER NO. D-79721-A
INVOICE NO. 40222
INVOICE DATE 12.4.59

SOLD TO San Juan Basin Const. Inc.
P. O. Box 2116
Farmington, New Mexico

CAR NO.

SHIP TO Same: City of Farmington Job

ROUTE CUSTOMER'S TRUCK

RATE

R. R. DESTINATION

FINAL DESTINATION FARMINGTON, NEW MEXICO

F. O. B. FOUNDRY WITH $20.40 NET TON FREIGHT ALLOWANCE

TERMS 30 DAYS NET

DESCRIPTION & QUANTITY ORDERED	QUANTITY SHIPPED PIECES	QUANTITY SHIPPED FEET	UNIT PRICE	AMOUNT
78 Pcs. 4"x18'1½" ASA Class 22, TYTON JOINT, THIN CEMENT LINED, SEAL COATED, SUPER DELAVAUD Cast Iron Pipe. 1413'9"	78	1413'9"	1.36 ft.	1922 70
33 " 6"x18'1½" ASA Class 22, TYTON JOINT, THIN CEMENT LINED, SEAL COATED, SUPER DELAVAUD Cast Iron Pipe. 598'1½"	33	598'1½"	2.03 "	1214 19
78 " 4" Tyton Gaskets	78		N/C	
33 " 6" Tyton Gaskets	33		N/C	
2 Qts. Tyton Lubricant	02		N/C	
				3136 89
	LESS FRT. ON 40730 LBS.			415 45
				2721 44
	DK 2½	2721 44	68 04	

General Office and Foundries

18½T P. O. Box 18, Provo, Utah

ORDER NO D-79721-A YOUR ORDER 3942
ORDER DATE Dec. 8, 1959 YOUR REQ.

ORDER NO. D-79721-A
INVOICE NO. 40222
INVOICE DATE 12.4.59

CAR NO

SOLD TO San Juan Basin Const. Inc.
P. O. Box 2116
Farmington, New Mexico

SHIP TO Same: City of Farmington Job

ROUTE CUSTOMER'S TRUCK

RATE

R. R. DESTINATION

FINAL DESTINATION FARMINGTON, NEW MEXICO

F. O. B. FOUNDRY WITH $20.40 NET TON FREIGHT ALLOWANCE

TERMS 30 DAYS NET

EXHIBIT 6(e).

DESCRIPTION & QUANTITY ORDERED	QUANTITY SHIPPED PIECES	QUANTITY SHIPPED FEET	UNIT PRICE	AMOUNT
78 Pcs. 4"x18'1½" ASA Class 22, TYTON JOINT, THIN CEMENT LINED, SEAL COATED, SUPER DELAVAUD Cast Iron Pipe.	78	1413'9"	1.36 ft.	1922 70
33 " 6"x18'1½" ASA Class 22, TYTON JOINT, THIN CEMENT LINED, SEAL COATED, SUPER DELAVAUD Cast Iron Pipe.	33	598'1½"	2.03 "	1214 19
78 " 4" Tyton Gaskets	78		N/C	
33 " 6" Tyton Gaskets	33		N/C	
2 Qts. Tyton Lubricant	02		N/C	
				3136 89
	LESS FHT. ON 40730 LBS.			415 45
				2721 44
	DK. 2½	2721 44	68 04	

TERMS AND CONDITIONS OF THIS SALE ARE PRINTED ON THE BACK OF THIS INVOICE, AND ARE MADE A PART HEREOF.
ALL CLAIMS FOR WHICH WE MAY BE RESPONSIBLE MUST BE MADE WITHIN 10 DAYS FROM RECEIPT OF SHIPMENT.
FREIGHT ALLOWANCE IS BASED ON RATE QUOTED. CONSIGNEE ASSUMES RISK IN PAYING ANY ADDITIONAL AMOUNT WITHOUT OUR AUTHORITY. IN ORDER FOR YOU TO COLLECT FOR LOSS OR DAMAGE IN TRANSIT, NOTATION MUST BE MADE BY FREIGHT AGENT ON PAID EXPENSE BILL. DEDUCTIONS FROM THIS INVOICE FOR LOSS OR DAMAGE CANNOT BE ALLOWED.
BY ORDER OF INTERSTATE COMMERCE COMMISSION, CARRIERS CANNOT PAY CLAIMS FOR LOSS OR DAMAGE UNLESS FILED WITH THEM WITHIN FOUR (4) MONTHS AFTER DELIVERY OF SHIPMENT, OR IN CASE OF FAILURE TO DELIVER, THEN WITHIN FOUR (4) MONTHS AFTER REASONABLE TIME FOR DELIVERY HAS ELAPSED.
We, the undersigned, do hereby guarantee that the articles or commodities listed herein were produced or manufactured in accordance with the Federal Child Labor Act of September 1, 1916.

PACIFIC STATES CAST IRON PIPE CO.

TERMS AND CONDITIONS

1—Quotations are for immediate acceptance only and subject to change without notice.

2—Agreements are contingent upon strikes, fires, accidents, car shortage, or any other causes beyond our control.

3—Shipping promises count from receipt at foundry of full manufacturing and shipping details; they are based upon present expectations but are not guaranteed. Material in stock is offered subject to prior sale.

4—Delivery is to be made F. O. B. seller's foundry, upon which seller's responsibility ceases.

5—Freight charges when included in the selling price, are to be paid by the buyer. Freight allowance is based on a specific rate to agreed destination and when shipments are forwarded freight collect the amount of freight is to be deducted by us on the face of the invoice. Consignee assumes the risk in paying any additional charges without our consent.

6—PAYMENT: Net cash in Provo, Utah, unless otherwise agreed in writing.

7—CLAIMS: All claims for corrections or deductions must be made within ten days after receipt of goods.
All material is rigidly tested and inspected at the foundry and is carefully loaded. Seller agrees to replace at agreed point of delivery any material proven defective, or which does not conform to the specifications shown in the order placed in acceptance of this quotation.
The measure of the damage is the price of defective material only. No charge for labor or expense required to repair defective material, or for any consequential damages, will be allowed.
Claims for breakage or loss in transit must be filed with the carrier's agent promptly, as the Inter-State Commerce Commission prohibits carriers from paying loss or damage claims unless such claims are filed with them within four months after delivery date. It is impossible to collect for damaged or lost articles unless you have the original bill of lading and the original receipted freight bill with exception showing the loss or damage and signed by the carrier's agent. In case of damage by the carrier, we will, if desired, make claim on behalf of our customers, provided we are supplied with the necessary data to substantiate the claim.

8—When orders have been filled as specified, no goods may be returned, nor will any credit be allowed, unless our consent has first been secured, and all goods returned will, if accepted, be credited less the cost of handling and the freight and cartage expenses incurred.

9—All orders submitted to us through our division sales offices, sales agents, or direct to the general office by the buyer, must be subject to the approval of the Vice-President, Treasurer, or General Sales Manager of the Pacific States Cast Iron Pipe Company at Provo, Utah, for final acceptance.

10—Unless assented to by the proper official of our company, in writing, no terms or conditions at variance with, or in addition to, those indicated herein shall apply to any transaction resulting from this quotation.

PACIFIC STATES CAST IRON PIPE CO

ACCESS ROADS
STREETS AND UTILITIES
FOR
PAGE, ARIZONA

GLEN CANYON UNIT, ARIZONA-UTAH
MIDDLE RIVER DIVISION
COLORADO RIVER STORAGE PROJECT

EXHIBIT 7(a)

Bids will be considered on the following schedule, but no bid will be considered for only a part of the schedule.

SCHEDULE

Item No.	Work or material	Quantity and unit	Unit price	Amount
1	Excavation for roadway	31,500 cu. yds.	$	$
2	Watering for roadway	2,500 M gallons		
3	Rolling embankments for roadway	220 roller hours		
4	Overhaul of excavation for roadway	1,800 mile cu. yds.		
5	Excavation for roadway culverts	300 cu. yds.		
6	Compacted backfill for roadway culverts	300 cu. yds.		
7	Furnishing and laying 24-inch diameter, No. 16-gage corrugated-metal pipe for roadway	320 lin. ft.		
8	Furnishing and laying 36-inch diameter, No. 14-gage corrugated-metal pipe for roadway	50 lin. ft.		
9	Furnishing and laying 22-inch by 13-inch, No. 16-gage corrugated-metal pipe arch for roadway	52 lin. ft.		

SCHEDULE (Continued)

Item No.	Work or material	Quantity and unit	Unit price	Amount
43	Furnishing and laying 36-inch diameter, No. 14-gage corrugated-metal pipe for community surface drainage system	1,300 lin. ft.	$	$
44	Furnishing and laying 48-inch diameter, No. 12-gage corrugated-metal pipe for community surface drainage system	800 lin. ft.		
45	Furnishing and installing frames and gratings for drop inlets and curb inlets	41 frames and gratings		
46	Furnishing and installing frames and covers for drainage manholes	4 frames and covers		
47	Furnishing and laying 3-inch diameter water pipe and fittings for water mains	100 lin. ft.		
48	Furnishing and laying 6-inch diameter water pipe and fittings for water mains	13,000 lin. ft.		
49	Furnishing and laying 8-inch diameter water pipe and fittings for water mains	19,000 lin. ft.		
50	Furnishing and laying 10-inch diameter water pipe and fittings for water mains	5,300 lin. ft.		
51	Furnishing and laying 12-inch diameter water pipe and fittings for water			

[fol. 218]

SCHEDULE (Continued)

Item No.	Work or material	Quantity and unit	Unit price	Amount
52	Furnishing and laying 14-inch diameter water pipe and fittings for water mains	2,700 lin. ft.	$	$
53	Furnishing and installing fire hydrants	25 hydrants		
54	Furnishing and laying 3/4-inch diameter galvanized wrought-iron service piping	,000 lin. ft.		
55	Furnishing and laying 1-inch diameter galvanized wrought-iron service piping	400 lin. ft.		
56	Furnishing and laying 2-inch diameter galvanized wrought-iron service piping	1,000 lin. ft.		
57	Furnishing and installing 3/4-inch service connections with goosenecks	50 connections		
58	Furnishing and installing 1-inch service connections with goosenecks	20 connections		
59	Furnishing and installing 2-inch service connection with gooseneck	1 connection		
60	Furnishing and installing 3/4-inch curb stop and service-box assemblies	50 assemblies		
61	Furnishing and installing 1-inch curb stop and service-box assemblies	20 assemblies		

SCHEDULE (Continued)

Item No.	Work or material	Quantity and unit	Unit price	Amount
62	Furnishing and installing 2-inch curb stop and roadway box assembly	1 assembly	$	$
63	Furnishing and installing 3-inch diameter gate valve and valve-box assembly	1 assembly		
64	Furnishing and installing 6-inch diameter gate valve and valve-box assemblies	42 assemblies		
65	Furnishing and installing 8-inch diameter gate valve and valve-box assemblies	27 assemblies		
66	Furnishing and installing 10-inch diameter gate valve and valve-box assemblies	3 assemblies		
67	Furnishing and installing 12-inch diameter gate valve and valve-box assemblies	2 assemblies		
68	Furnishing and installing 14-inch diameter gate valve and valve-box assembly	1 assembly		
69	Furnishing and installing 3-inch water meter, valve, and meter manhole assembly	1 assembly		
70	Furnishing and installing 10-inch water meter, valve, and meter manhole assemblies	2 assemblies		

SCHEDULE (Continued)

Item No.	Work or material	Quantity and unit	Unit price	Amount
71	Furnishing and installing street washers	20 washers	$	$
72	Disinfecting water mains	For the lump sum of		
73	Furnishing and laying 4-inch diameter clay sewer pipe and fittings for sewage collecting system	2,500 lin. ft.		
74	Furnishing and laying 6-inch diameter clay sewer pipe and fittings for sewage collecting system	1,900 lin. ft.		
75	Furnishing and laying 8-inch diameter clay sewer pipe and fittings for sewage collecting system	21,280 lin. ft.		
76	Furnishing and laying 10-inch diameter clay sewer pipe and fittings for sewage collecting system	5,830 lin. ft.		
77	Furnishing and laying 12-inch diameter clay sewer pipe and fittings for sewage collecting system	1,580 lin. ft.		
78	Furnishing and laying 8-inch diameter cast-iron soil pipe and fittings for sewage collecting system	1,920 lin. ft.		
79	Furnishing and laying 10-inch diameter cast-iron soil pipe and fittings for sewage collecting system	470 lin. ft.		
80	Furnishing and laying 12-inch diameter cast-iron soil pipe and fittings for sewage collecting system	220 lin. ft.		

SCHEDULE (Continued)

Item No.	Work or material	Quantity and unit	Unit price	Amount
81	Constructing sewer manholes 4 feet and less in depth	111 manholes	$	$
82	Constructing each additional foot of sewer manhole below 4-foot depth	150 lin. ft.		
83	Furnishing and installing sewer clean-outs	23 clean-outs		
84	Furnishing and erecting chain-link fence	4,000 lin. ft.		
85	Furnishing additional water and sewer pipe	For the lump sum of		
		TOTAL FOR SCHEDULE		$

[fol. 222]

[fol. 223]

SPECIAL CONDITIONS

12. *The requirement.* It is required that there be constructed and completed, in accordance with the Standard Form of Construction Contract 23, including the General Provisions[3] (Standard Form 23A), these specifications, and the drawings listed in Paragraph 123 hereof, access roads, streets, and utilities for Page, Arizona, Glen Canyon Unit, Arizona-Utah, Middle River Division, Colorado River Storage Project. Except as otherwise specified or directed, no work will be performed in the contractor's town site. The work is situated near the Glen Canyon Dam site on the Colorado River in Coconino County, Arizona, approximately 15 miles upstream from Lees Ferry, Arizona.

13. *Description of work.* The principal components of work to be performed under these specifications are as follows:

(a) Construction of access roads.—

(1) Construction of roadway, culverts, and crushed rock base, and placing of plant-mix bituminous surfacing for the following new road construction:

a. Connecting road, community to dam, approximately 1.7 miles.

b. North community access road, approximately 0.5 miles.

(2) Construction of roadway, culverts, and crushed rock base for south community access road, approximately 1.1 miles. This road will not be required to be bituminous-surfaced under these specifications.

(b) Grading streets, sidewalks, and drainage.—All work for grading the community streets, business area, school area, trailer area, and Government residential area; for constructing curbs and gutters, sidewalks, walkways and a surface drainage system; and for bituminous surfacing of community streets, in the Government area. Grading for warehouse area and approaches and construction of the

warehouse will not be required under these specifications. The warehouse area and approaches will be graded and ready for the bituminous surfacing approximately April 1958.

(c) Utilities.—Construction of a water-distribution system and a sewage-collecting system.

(d) Fence.—Erecting chain-link fence.

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[fol. 224]

EARTH WORKS

54. *Excavation and backfill of pipe trenches.* (a) General.—The items of the schedule for excavation and backfill of sewer-pipe trenches of the various depths includes all required excavation of trenches for the sewer mains and for the building sewers for the demountable houses.

The item of the schedule for excavation and backfill of water-pipe trenches includes all required excavation for the water mains, including branches to fire hydrants; and for the water-service lines for the demountable houses.

The trenches for the building sewers and water-service lines for the demountable houses shall extend to points 1 foot beyond the vertical sewer pipe and water-service line risers to the demountable houses.

Placing and consolidating backfill in pipe trenches shall be provided for in Paragraph 55.

All excavation for trenches for sewer lines shall be made to the lines and grades shown on the drawings or otherwise established by the contracting officer. All excavation for trenches for water lines shall be made to the lines shown on the drawings or otherwise established by the contracting officer and to a depth such as to provide at least 2 feet of cover over the pipe, as measured to the top of the pipe: *Provided*, That where a greater depth of trench is required to permit installation of the valve and valve-box assemblies; curb stops and service boxes; fire hydrants; water meter, valve and meter manhole assemblies; and other required installations, the trenches shall be excavated to the required depths at such installations.

[fol. 225] Trenches for all pipe shall have a bottom width equal to the diameter of the pipe plus 12 inches with a minimum width of 18 inches.

Where rock is encountered in the bottom of trenches for pipe, the trenches shall be excavated to a depth of 6 inches below the grade established for the bottom of the pipe and this additional excavation shall be backfilled to the established grade with material satisfactory to the contracting officer, which material shall be compacted thoroughly before the pipe is laid. If the character of the material at any point in the bottom of pipe trenches is such as might cause unequal settlement or provide unequal bearing for the pipe or is otherwise unsuitable for a foundation for the pipe, the unsatisfactory material shall be removed to such depth as may be directed by the contracting officer and the additional excavation shall be backfilled to the established grade with selected materials satisfactory to the contracting officer, which material shall be compacted in layers not more than 6 inches in thickness, before the pipe is laid. The contractor shall perform all required excavation below the subgrade for bells, couplings, fittings, and valves.

The contractor shall also perform all excavation required for sewer manholes, water meter manholes, sewer clean-outs, fire hydrants, curb stop and service-box assemblies, valve and valve-box assemblies, and street washers.

(b) Measurement and payment.—Measurement for payment for excavation and backfill of sewer pipe trenches will be made along the center line of the pipe in place with no deductions being made for manholes and fittings, and will extend to points 2 feet beyond the horizontal leg of Y-branch at sewer clean-outs, and to points 1 foot beyond the vertical sewer pipe riser at the demountable houses. To determine the item of the schedule under which payment for excavation and backfill of sewer-pipe trenches will be made, depths of trenches will be determined by measuring the depth from the limits of the general excavation or from the original ground surface where no general excavation is performed, to the invert elevation of the pipe or to such additional depth below the invert elevation of the pipe as

may be required by the contracting officer on account of unsatisfactory material encountered.

Measurement for payment for excavation and backfill of waterpipe trenches will be made along the center line of the pipe in place with no deductions being made for valves, fittings, water meters, curb stops, and sleeve couplings, and will extend to points 1 foot beyond the vertical water-service line riser to the demountable houses.

Payment for excavation and backfill of sewer-pipe trenches of the various depths will be made at the applicable unit price per linear foot bid therefor in the schedule, which unit price shall include the cost of all required excavation below subgrade for bell holes, and for bedding the sewer pipe.

[fol. 226] Payment for excavation and backfill of water-pipe trenches will be made at the unit price per linear foot bid therefor in the schedule, which unit price shall include the cost of all required excavation below subgrade for bell holes, couplings, fittings, valves, and for bedding the pipe.

The cost of performing all excavation for the sewer manholes, water meter manholes, sewer clean-outs, fire hydrants, curb stop and service-box assemblies, and street washers which is outside the limits of the required excavation for the sewer-pipe trenches and water-pipe trenches shall be included in the applicable unit prices bid in the schedule for furnishing and installing and for constructing these items.

55. *Placing and consolidating backfill in pipe trenches.* (a) General.—During the process of laying sewer pipe and water pipe, backfill of selected materials shall be placed carefully and tamped to a depth of 1 foot over the top of the pipe, except that joints, couplings, fittings, and valves of water pipe shall be left uncovered. Care shall be taken not to disturb the pipe, and backfill material shall be placed so as to give the pipe a continuous even bearing on the bottom and sides.

After the water pipe has been tested as provided in Paragraph 108, backfill of selected material shall be placed carefully and tamped thoroughly around the joints, couplings, fittings, and valves to a depth of 1 foot above the pipe, after which the remainder of the trench shall be backfilled.

After the sewer pipe has been tested for smoothness as provided in Paragraph 114, the trench shall be backfilled. Rocks shall not be rolled into trenches and allowed to drop on the pipe. Large rocks shall not be placed in the backfill within 1 foot of the pipe nor closer than 1 foot from the surface.

Except for trenches for water lines; for the sections of trench which cross roads, streets, gutters, curbs, and sidewalks; and for the sections of trenches which are outside of the community site, the final backfilling of the trenches shall be kept 1 foot below the existing ground surface for flooding, after which flooding the backfill shall be continued to the surface. During the flooding operations, bars shall be used continuously to facilitate the entry of water into all parts of the backfill. In lieu of flooding and where approved by the contracting officer, the backfill may be moistened and compacted thoroughly in layers not exceeding 6 inches in thickness.

All backfill above a point 1 foot above the top of the pipe in the sections of trench which cross roads, streets, gutters, curbs, and sidewalks shall be selected materials and shall be moistened and compacted in layers not exceeding 6 inches in thickness after compaction and in accordance with the applicable provisions of Paragraph 62.

Except for the section of trench which crosses roads, the backfill above a point 1 foot above the top of the pipe in [fol. 227] sections of trench which are outside of the community site will not be required to be puddled or compacted, and for these sections of trench, the contractor shall mound the backfill to the lines prescribed by the contracting officer. Except for the sections of trench which crosses roads, streets, curbs, gutters, and sidewalks, the backfill above a point 1 foot above the pipe in the water pipe trenches will not be required to be compacted or puddled, and for these trenches, the contractor shall place the backfill to the elevation of the existing ground surface.

The contractor shall also place and consolidate all backfill about sewer manholes, water meter manholes, sewer clean-outs, fire hydrants, curb stop and service-box assemblies, and street washers. The backfill about service boxes,

valve boxes, street washers, and other accessories where required, shall be compacted thoroughly to prevent settlement of the boxes and other accessories. Except as otherwise specified, all backfill about sewer manholes, water meter manholes, sewer clean-outs, and fire hydrants shall be consolidated in the same manner as the backfill in the adjacent pipe trench.

(b) Cost.—Except as specified below, the cost of performing all work described in this paragraph shall be included in the applicable unit price bid in the schedule for excavation and backfill of sewer-pipe trenches and for excavation and backfill of water-pipe trenches.

The cost of backfilling and consolidating backfill about sewer manholes, water meter manholes, sewer clean-outs, fire hydrants, curb stop and service-box assemblies, and street washers which is outside the limits of the required backfilling and consolidating backfill for the sewer-pipe trenches and water-pipe trenches shall be included in the applicable unit prices bid in the schedule for furnishing and installing and for constructing these items.

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[fol. 228]

WATER DISTRIBUTION SYSTEM

100. *General.* The contractor shall furnish all materials for and shall construct and test the water distribution system for the community as shown on the drawings and as specified herein.

The water distribution system will include water mains; water-service lines from the mains to points of connection at demountable houses as shown on Drawing No. 42 (40-D-5427); a water-service line for the sewage treatment plant from the main to a point opposite manhole 1 as shown on Drawing No. 33 (557-D-302); water meter manholes; water meters; sleeve couplings; fire hydrants; valves, valve boxes, curb stops; and roadway and service boxes; service connections; and street washers, including service lines to street washers.

Water-service connections and water-service piping for other buildings and residences will not be required to be installed under these specifications.

All pipe for water mains 10 inches and less in diameter shall be cast-iron water pipe with mechanical-type or rubber-gasket-type joints: *Provided*, That at the water meters the joints shall be as shown on Drawing No. 38 (557-D-310) and that at fire hydrants and valves the contractor, at his option, may use either mechanical type joints or flanged joints. All pipe for water mains more than 10 inches in diameter shall be, at the contractor's option, either cast-iron water pipe with mechanical-type or rubber-gasket-type joints; or asbestos-cement water pipe with sleeve-type couplings and rubber ring gaskets; *Provided*, That at valves the contractor, at his option, may use either mechanical-type joints or flanged joints.

All fittings for use with the cast-iron water pipe and asbestos-cement water pipe shall be cast-iron bell-and-spigot mechanical-type water pipe fittings. Only one type of pipe and joints shall be used for each size of water mains.

The contractor shall furnish the Government in addition to the quantities of water pipe which are furnished and installed under these specifications, the following minimum quantities of water pipe:

50 linear feet of 14-inch diameter water pipe;
50 linear feet of 12-inch diameter water pipe;
50 linear feet of 10-inch diameter water pipe;
100 linear feet of 8-inch diameter water pipe; and
100 linear feet of 6-inch diameter water pipe.

The additional water pipe furnished shall be of the same type and shall have the same type of joints as the water pipe installed under these specifications and shall be furnished in standard nominal laying lengths. The additional quantities of water pipe shall be delivered to the Government at the Government warehouse.

[fol. 229] All pipe for service lines shall be galvanized wrought-iron pipe with screwed-type joints.

The contractor shall connect the water-service lines for the demountable houses to the service piping from the demountable houses which houses will be installed by others.

Gravel fills shall be placed at all fire hydrants, curb stops, street washers, in pockets for water meter manholes, and

elsewhere where shown on the drawings. All gravel or crushed rock for gravel fills shall range in size from ¾ to 1 and ½ inches.

101. *Data to be furnished by the contractor.* (a) General.—Before proceeding with procurement of wrought-iron pipe, cast-iron pipe, abestos-cement pipe, cast-iron pipe fittings, fire hydrants, and water meters, the contractor shall submit to the Government for approval, the following data: Catalogs, specifications, detailed descriptions, manufacturer's names and catalog numbers, and other applicable information covering the above materials which the contractor proposes to furnish. Where the data are in catalog form or several items are listed on the same sheet, the material to be furnished shall be marked clearly and prominently.

The time allowed for approval of data submitted to the Government for approval shall be as provided in Paragraph 16.

The Government shall have the right to require the contractor to make changes in the materials which he proposes to purchase which the Government determines necessary to conform to the requirements and intent of these specifications. Approval by the Government of the contractor's data shall not be held to relieve the contractor of any part of the contractor's obligation to meet all of the requirements of these specifications.

(b) Mailing address.—Approval data required under Subparagraph (a) above shall be forwarded to the Assistant Commissioner and Chief Engineer, Bureau of Reclamation, Building 53, Denver Federal Center, Denver 2, Colorado, Attention: Code D-260. In addition to the above, the contractor shall forward a copy of his transmittal letter to the Project Construction Engineer, Bureau of Reclamation, Kanab, Utah.

(c) Costs.—The cost of submitting data to the Government shall be included in the prices bid in the schedule for the work in which the materials are to be used.

102. *Materials.* (a) Wrought-iron pipe.—WW-P-441b, class A, zinc-coated. The pipe shall be hydrostatically tested

at the mill, but tests will not be required to be performed in the presence of a Government inspector.

(b) Cast-iron water pipe.—

[fol. 230] (1) Cast-iron bell-and-spigot water pipe with mechanical joints.—WW-P-421a, class 150, type III, coated; or class 150, coated, bell-and-spigot water pipe with mechanical joints in accordance with AWWA standards.

(2) Cast-iron bell-and-spigot water pipe with rubber-gasket joints.—The cast-iron bell-and-spigot water pipe with rubber-gasket joints shall be class 150, coated, cast-iron water pipe in accordance with the AWWA standards for cast-iron bell-and-spigot pipe, except that the pipe joints shall be equal to the joints of the Tyton joint pipe as manufactured by the United States Pipe and Foundry Company, Birmingham 2, Alabama.

(c) Asbestos-cement pipe and couplings.—Asbestos-cement pipe shall be class 150 asbestos-cement pipe and shall be equal to class 150, Transite "ring-tite" pressure pipe as manufactured by Johns-Manville, 22 East 40th Street, New York 16, New York. Couplings for asbestos-cement pipe shall be equal to "ring-tite" couplings as manufactured by Johns-Manville.

(d) Cast-iron flange and spigot fittings.—In accordance with AWWA standards.

(e) Cast-iron bell-and-spigot mechanical joint water pipe fittings.—AWWA Specification C111.

(f) Malleable-iron and wrought-iron fittings.—WW-P-521c, type II.

(g) Nipples.—WW-N-351a, type I, zinc-coated.

(h) Gate valves.—WW-V-58, class A, Designation NF, nonrising stem, flanged ends; or equal to gate valve No. F-2405 with mechanical joint ends and nonrising stem shown on page 122 of Pipe Economy Catalog No. 56 of James B. Clow and Sons. The valves for the water meter

manholes shall be furnished with handwheels. All other valves shall be furnished with operating nuts.

(i) Valve boxes.—The valve boxes shall be cast-iron boxes and shall be complete with covers and bases. The valve boxes shall be equal to valve box F-2450 shown on page 128 of Pipe Economy Catalog No. 56 of James B. Clow and Sons, 201-299 N. Talman Avenue, Chicago 80, Illinois, and shall be complete with lock cover for water, F-2498; No. 4 base F-2480 for 3-inch valve; No. 6 base F-2465 for 6-inch and 8-inch valves, and No. 160 base F-2484 for 10-inch and larger valves. The valve boxes shall be for installation where the minimum depth of bury to the top of the pipe is 2 feet 0 inch.

(j) T-handle socket wrenches.—T-handle socket wrenches for operating the gate valves shall be equal to F-2520 socket wrench shown on page 129 of Pipe Economy Catalog No. 56 of James B. Clow and Sons.

[fol. 231] (k) Goosenecks.—The goosenecks with corporation stops for connection of water-service pipes to the water mains shall be equal to either No. F-4424 lead pipe gooseneck with lead flanged joints or No. F-4428 copper tubing gooseneck with copper flanged joints shown on page 191 of Pipe Economy Catalog No. 56 of James B. Clow and Sons. The goosenecks without corporation stops for connection of service pipes to the water mains shall be equal to the goosenecks of the combination goosenecks and corporation stops specified above.

(l) Service boxes.—Service boxes for ¾-inch and 1-inch curb stops shall be 2 and ½-inch diameter. The curb stops shall be adjustable type and shall be complete with bases, covers, and extensions for use in water lines where the minimum depth of bury to the top of the pipe is 2 feet 0 inch. The 2 and ½-inch service box shall be equal to service box No. F-4600 as shown on page 199 of Pipe Economy Catalog No. 56 of James B. Clow and Sons.

(m) Roadway boxes.—Roadway box shall be 4 and ½-inch diameter adjustable type and shall be complete with base, cover, and extension and shall be equal to roadway

box No. F-4702 as shown on page 201 of Pipe Economy Catalog No. 56 of James B. Clow and Sons.

(n) Curb stops.—Curb stops 1 and 1½ inches and less in size shall be equal to flatway ground key stop with Drain No. F-4442 shown on page 192 of Pipe Economy Catalog No. 56 of James B. Clow and Sons.

(o) Rod and clamp.—The rod and clamps for operating the ¾-inch curb stops and for operating the 1 and 1½-inch curb stop shall be equal to No. F-4675, sizes No. 1 and 2, respectively, both as shown on page 200 of Pipe Economy Catalog No. 56 of James B. Clow and Sons.

(p) Fire hydrants.—Fire hydrants shall have main valve openings not less than 4 and ¾ inches in diameter, and shall be complete with frost case and with bottom connection for 6-inch cast-iron pipe. Hydrants shall have two 2 and ½-inch nominal diameter (3-inch outside diameter) hose nozzles and one 4 and ½-inch nominal diameter (5 and ¾-inch outside diameter) pumper nozzle. The 2 and ½-inch nominal diameter hose nozzles shall have National (American) Standard fire hose coupling screw threads with 7 and ½ threads per inch. The 4 and ½-inch nominal diameter pumper nozzles shall have National (American) Standard fire hose coupling screw threads with 4 threads per inch. The nut on the nozzle caps and the operating nut for opening hydrant shall be pentagonal. Length shall be for installation where the distance from the surface of the ground to the top of the connecting pipe is a minimum of 2 feet 0 inch. Hydrants shall open by turning nut to left. Hydrants shall be equal to No. F-2655 with mechanical joint end of No. F-2660 with flanged connections as shown on page 136 of Pipe Economy Catalog No. 56 of James B. Clow and Sons.

(q) Hydrant wrenches.—The hydrant wrenches shall be equal to No. F-2730 hydrant wrenches shown on page 140 of Pipe Economy Catalog No. 56 of James B. Clow and Sons.

[fol. 232] (r) Zinc-rich paint.—Zinc-rich paint shall be equal to ZRC zinc-rich paint as manufactured by the Sealube

Company, 14 Valley Street, Wakefield, Massachusetts, or to Galvicon as manufactured by Galvicon Corporation, 40 West 29th Street, New York 1, New York.

(s) Street washers.—Street washers shall be equal to street washer No. F-4715 shown on page 202 of Pipe Economy Catalog No. 56 of James B. Clow and Sons. The street washers shall be for installation where the minimum depth of bury is 2 feet 0 inch. Each street washer shall be furnished with one standard operating key.

(t) Clay sewer pipe.—SS-P-361b, type I, class 1, glazed or unglazed.

(u) Precast-concrete pipe.—Precast-concrete pipe and cones for water meter manholes.—The precast-concrete pipe and cones for the water meter manholes shall be reinforced-concrete pipe and cones as shown on Drawing No. 38 (557-D-310), and shall have an ultimate compressive strength of not less than 3,000 pounds per square inch.

(v) Bituminous joint compound.—Standard commercial quality for use with hot-poured joints, shall adhere to cold, wet glazed clay or cast-iron sewer pipe; shall be dense, chemically inactive, and elastic; shall set quickly; and shall contain no filler which might settle out.

(w) Water meters.—The 3-inch and 10-inch size water meters shall be equal to "Trident" Crest Meter No. F-4774, all as shown on page 204 of Pipe Economy Catalog No. 56 of James B. Clow and Sons, 201-299 N. Talman Avenue, Chicago, Illinois. The meters shall have circular reading registers recording in gallons.

(x) Water meter frames and covers.—The water meter frames and covers for the water meter manholes shall be equal to valve manhole cover No. R-1900E as manufactured by Neenah Foundry Company, Neenah, Wisconsin.

(y) Sleeve couplings.—The sleeve couplings shall be equal to Sleeve Coupling F-248 as shown on page 30 of Pipe Economy Catalog No. 56 of James B. Clow and Sons.

(z) Trap inlet drains.—The trap inlet drains shall be equal to cast-iron trap inlet drain with loose strainer F-

3946 as shown on page 179 of Pipe Economy Catalog No. 56 of James B. Clow and Sons.

(aa) Pipe insulation.—The pipe insulation shall be a standard fibrous-glass insulation not less than 1 inch thick.

(bb) Bolts, studs, and nuts.—

(1) For mechanical joints in water lines.—In accordance with WW-P-421a.

[fol. 233] (2) For flanged joints in water lines.—In accordance with ASA B16.1 Specifications.

103. *Laying pipe for water mains.* (a) General.—All pipe, fittings, and valves shall be laid true to the lines established by the contracting officer.

Concrete thrust blocks shall be provided at each intersection and change in direction of the water mains, at fire hydrants, at valves 12 inches and larger in size, and elsewhere as required. The thrust blocks shall be of the sizes shown on the drawings. Concrete shall be in accordance with applicable parts of Paragraphs 77 to 93. Pipe and fittings to be embedded in concrete shall be held firmly in positions and protected from damage while the concrete is being placed. The contractor shall place plugs or caps on all unconnected ends of pipe. Whenever the work ceases for any reason, all open ends shall be plugged with tight-fitting temporary plugs or covers. All joints shall be made watertight.

(b) Joints in water piping.—

(1) Rubber-gasket-type joints.—The rubber-gasket-type joints shall be made in accordance with the manufacturer's instructions. The rubber gasket shall be protected at all times from the sun and heat and at the time of installation shall show no deterioration.

(2) Asbestos-cement sleeve-type couplings.—Asbestos-cement sleeve-type couplings shall be installed at joints in asbestos-cement pipe in accordance with the manufacturer's instructions. The rubber rings in the couplings shall be protected at all times from the sun

or heat and at the time of installation shall show no deterioration.

(3) Mechanical-type joints.—The last 8 inches of the outside surface of the spigot end and the inside of the bell of the mechanical joint pipe shall be cleaned thoroughly to remove oil, grit, tar (other than standard coating), and other foreign material from the joint and then painted with a soap solution. The soap solution shall be made by dissolving ½ cup of granulated soap in 1 gallon of water. The cast-iron gland shall then be slipped on the spigot end of the pipe with the lip extension of the gland toward the socket or bell end. The rubber gasket shall be painted with the soap solution and placed on the spigot end with the thick end toward the gland.

The entire section of pipe shall then be pushed forward to seat the spigot end in the bell. The gasket shall be pressed in place within the bell and care shall be taken to have the gasket evenly located around the entire joint. The cast-iron gland shall be moved along the pipe into position for bolting, all bolts shall be inserted, and the nuts shall be screwed up tightly with the fingers. All nuts shall be tightened with a suitable wrench. Nuts spaced 180 degrees apart shall be tightened alternately in order to produce an equal pressure on all parts of the gland.

[fol. 234] The mechanical-type joints shall be carefully installed to provide watertight joints.

104. *Fire hydrants.* (a) General.—Fire hydrants complete with fittings required for connection to cast-iron branches from the mains shall be installed as shown on the drawings. The gate valves, valve boxes, and cast-iron pipe branches are provided for in Paragraph 106 and 103. The contractor shall place the concrete thrust blocks and approximately ½ cubic yard of broken stone or coarse gravel for the fire hydrants as shown on the drawings. The top of each valve box and fire hydrant shall be placed at the grade established by the contracting officer. The contractor shall furnish 6 hydrant wrenches for operating the fire

hydrants. If special wrenches are required for repairing the hydrants, one complete set of such wrenches shall be furnished. The fire hydrants shall be furnished painted. The paint below grade line shall be the manufacturer's standard black asphalt varnish and the paint above grade line shall be the manufacturer's standard red paint.

105. *Water-service piping, service connections, curb stops, service boxes, and roadway box.* All required water-service piping, service connections, curb stops, and service boxes, and roadway box shall be installed where shown on the drawings, where specified herein, or where directed by the contracting officer.

All water-service piping shall be galvanized wrought-iron pipe with galvanized malleable-iron fittings, except that couplings shall be either galvanized wrought-iron couplings or galvanized malleable iron couplings.

The water-service connections shall be made as shown on Drawing No. 40 (40-D-3969).

The contractor shall furnish 4 rods and clamps for operating the ¾-inch curb stop and 1 rod and clamp for operating the 2-inch curb stop. All grouting shall be in accordance with the applicable requirements of Paragraph 111.

The service boxes for the curb stops for the service lines to the demountable houses shall, at the contractor's option, be either clay sewer-pipe service boxes with galvanized steel cover or standard service boxes as specified in Subparagraph 102(m). The service boxes for the street washers shall be in accordance with Subparagraph 102(l). The curb stops and service boxes for the demountable houses shall be located as shown on Drawing No. 42 (40-D-5427). The straw for the service box as shown on Drawing No. 42 (40-D-5427) will not be required under these specifications.

The road box for the 1 and ½ inch curb stop for the water-service line to the sewage treatment plant shall be standard road box as specified in Subparagraph 102(m), and shall be located where shown on Drawing No. 33 (557-D-302).

[fol. 235] The vertical riser of the water-service lines to the demountable houses shall be insulated for mild climate

conditions and encased in concrete as shown on Drawing No. 42 (40-D-5427).

The 12-inch long nipple between the water main and the 1- and 1½-inch curb stop shall be a galvanized wrought-iron nipple. The top of the service boxes shall be set true to the established grades, and the backfill about the boxes shall be tamped thoroughly to avoid settlement of the boxes. Approximately ⅛ cubic yard of gravel shall be placed under each of the curb stop and service-box assemblies.

All threads of screwed type joints shall be full cut and free from torn or ragged surfaces. Pipe joint cement shall be used on the male threads only. After installation, all exposed threads shall be cleaned of joint cement and other foreign material and given a heavy coat of zinc-rich paint. Care shall be exercised so as not to damage the zinc coating on any piping. Damage areas of zinc coating shall be given a heavy set of zinc-rich paint.

106. *Gate valves, valve boxes, water meters, and water meter manholes.* Gate valves, valve boxes, water meters, and water meter manholes shall be installed where shown on the drawings or otherwise directed by the contracting officer.

The water meter manholes shall, at the contractor's option, be either precast-concrete manholes or cast-in-place concrete manholes. The precast-concrete manholes shall be constructed as shown on Drawing No. 38 (557-D-310).

The design of the cast-in-place concrete manholes shall be similar to the design of the cast-in-place sewer manholes shown on Drawing No. 39 (40-D-3968). The base slabs for the precast-concrete manholes shall be cast-in-place concrete base slabs. The bottom of the lower pipe section for the precast-concrete manholes shall be cut square to fit the base and all joints shall be made with cement mortar. Where the water pipe enters the precast-concrete manhole, the necessary holes in the manhole barrel shall be cut neatly and accurately to receive the pipe sleeves and the pipe sleeves grouted in place. The manhole frames shall be grouted in place. All grouting shall be in accordance with the applicable requirements of Paragraph 111. The

drain line and gravel pocket for the manholes shall be constructed as shown on the drawing.

The contractor shall perform all required excavation, backfill, and consolidating of backfill for the drain line and gravel pocket for the manhole. The excavation, backfill, and consolidating of backfill shall be in accordance with the applicable requirements of Paragraphs 54 and 55. The cast-iron soil pipe and clay sewer pipe shall be laid and tested for smoothness in accordance with the applicable provisions of Paragraph 114.

[fol. 236]. The top of each valve box and manhole shall be placed at the grade established by the contracting officer.

The contractor shall furnish 3 T-handle socket wrenches for operating the gate valves.

107. *Street washers.* Street washers shall be installed where shown on the drawings or where directed. Approximately 4 cubic feet of crushed stone or gravel shall be placed under the drain for each street washer. The street washer control and hose-connection boxes shall be installed flush with the top of the final grade. The contractor shall furnish one loose operating key with each street washer.

108. *Testing water-pipe lines.* (a) Pressure test.—After each section of the pipe for the water mains between valves has been laid, the joints completed, the valves installed, and the trenches partially backfilled, as specified in Paragraph 55, the contractor shall subject the pipe in the water mains to a hydrostatic pressure of 140 pounds per square inch for a period of not less than 1 hour. All fire hydrants and service connections in the section to be tested shall be connected before the test is made. The service piping shall be subjected to a minimum hydrostatic pressure of 100 pounds per square inch for a period of not less than 1 hour.

Each section of the pipe to be tested shall be slowly filled with water and the specified test pressure, based on the elevation of the lowest point of the section of pipe under test and corrected to the elevation of the test gage, shall be applied by means of a pump connected to the pipe in a manner satisfactory to the contracting officer. The contractor shall furnish all pumping apparatus, labor, tools,

pressure gages, and other equipment, and water required for making the tests. All water used for testing shall be subject to the approval of the contracting officer. The contractor, with the approval of the contracting officer, may at his option and expense, test shorter runs of pipe by plugging the ends of the pipe.

Before applying the specified test pressure, all air shall be expelled from the pipe. If hydrants or blow-offs are not available at high places, the contractor shall make the necessary taps at points of highest elevation before the test is made and insert plugs after the test has been completed.

All exposed pipes, fittings, valves, hydrants, and joints shall be carefully examined during the test. Any cracked or defective pipes, fittings, valves, and hydrants discovered during the pressure test shall be removed and replaced by the contractor with sound material, and the test repeated as required, all at the expense of the contractor.

During the pressure test, the service piping shall also be checked for leakage and if any part of the service piping, including curb stops, joints, or fittings, shows any leakage it shall be made watertight.

All testing shall be done in the presence of a duly authorized Government inspector.

[fol. 237]. (b) Leakage test.—After the pressure test has been satisfactorily completed, the contractor shall test the water mains for leakage. The contractor shall furnish all pumping apparatus, labor, tools, pressure gages, measuring devices for leakage test, and other equipment, and water required for making the test. All water used for testing shall be subject to the approval of the contracting officer.

The duration of the leakage test shall be for not less than 2 hours, and during the leakage test, the piping shall be subjected to a minimum hydrostatic pressure of 100 pounds per square inch, based on the elevation of the lowest point of the section of pipe under test and corrected to the elevation of the test gage.

Leakage is defined as the quantity of water to be supplied into any section of pipe being tested as is necessary to maintain the specified leakage test pressure after the pipe has been filled with water and the air expelled.

When the leakage test is being performed on asbestos-cement water pipe, the section of pipe being tested must be filled with water for at least 24 hours before starting the leakage test.

The allowable leakage in the water pipe mains will be 0.00542 gallon per inch diameter of pipe per hour per joint. Should any test of the pipe disclose leakage greater than that specified above, the contractor shall at his own expense locate and repair the defective joints until the leakage is within the specified allowance.

All testing shall be done in the presence of a duly authorized Government inspector.

(c) The entire cost of testing the water piping and of furnishing all pumping apparatus, labor, tools, pressure gages, measuring devices for leakage test, and water, and other equipment and materials for making the tests shall be included in the prices bid in the schedule for performing the various items of work necessary to complete the water distribution system.

109. *Disinfecting water mains.* At the option of the contracting officer, disinfecting of water mains may or may not be required under these specifications and no payment will be made under the item of the schedule for disinfecting water mains if this work is not required. If required, the water mains for the water distribution system shall be disinfected before being placed in service. The water mains shall be disinfected in accordance with the provisions of the Standard Procedure for Disinfecting Water Mains, AWWA C601, of the American Water Works Association.

Care shall be taken to see that the disinfecting solution is flushed thoroughly from the water mains and supply lines and that the disinfecting solution is kept from entering water-service lines.

[fol. 238] 110. *Measurement and payment.* (a) Water pipe and fittings for water mains.—Measurement for payment for furnishing and laying the various sizes of water pipe and fittings for water mains will be made along the center lines of the pipe and fittings in place, and from center to center of intersecting lines with deductions for valves

and water meters and for sleeve couplings in meter manholes, but with no allowance for lap at joints, and including the pipe branches between mains and fire hydrants. Payment for furnishing and laying the various sizes of water pipe and fittings for water mains will be made at the applicable unit price per linear foot bid therefor in the schedule, which unit price shall include, as applicable, the cost of laying the water pipe and fittings; of jointing the pipe and fittings; of testing the water lines; of furnishing all materials for concrete thrust blocks, including cement; of constructing the concrete thrust blocks; of performing all excavation, backfill, and consolidating backfill required for the thrust blocks which is outside the limits of the required excavation, backfill, and consolidating backfill for the pipe trenches.

Payment for furnishing additional water pipe will be made under the lump-sum price bid in the schedule for furnishing additional water and sewer pipe.

(b) Fire hydrants.—Payment for furnishing and installing fire hydrants will be made at the unit price per hydrant bid therefor in the schedule, which unit price shall include the cost of furnishing all materials required for installing the fire hydrants; of furnishing all materials for concrete thrust blocks, including cement; of constructing the concrete thrust blocks; of furnishing and placing the broken stone or coarse gravel; of making the connections to the branches from the mains; of furnishing hydrant wrenches and special repair wrenches; and of performing all excavation, backfill, and consolidating backfill required for the installation of the fire hydrants, concrete thrust blocks, and broken stone or coarse gravel which is outside the limits of the required excavation, backfill, and consolidating backfill for the pipe trenches.

(c) Galvanized wrought-iron service pipe.—Measurement for payment for furnishing and laying the various sizes of galvanized wrought-iron service piping will be made along the center lines of the pipe in place, with deductions for curb stops, and beginning at the point of connection with the lead gooseneck and extending to the point of connection

to street washers; to points of connection to the demountable house service lines; and to a point opposite manhole 1 for the service piping to the sewage treatment plant.

Payment for furnishing and laying the various sizes of galvanized wrought-iron service piping will be made at the applicable unit price per linear foot bid therefor in the schedule, which unit price shall include the cost, as applicable, of jointing the pipe; of connecting the service line to the gooseneck; of connecting the service line to the service piping at each demountable house; of connecting the service lines to the water mains; and of testing the service lines.

[fol. 239] (d) Service connections and goosenecks.—Payment for furnishing and installing the various sizes of service connections with goosenecks will be made at the applicable unit price per connection bid therefor in the schedule, which unit price shall include, as applicable, the cost of furnishing and installing the gooseneck and corporation stop or gooseneck and 12-inch wrought-iron nipple, and of making the connection to the water main, but does not include the cost of installing the curb stops and service-box assemblies.

(e) Curb stop and service-box assemblies and curb stop and roadway box assembly.—Payment for furnishing and installing the various sizes of curb stop and service-box assemblies and for furnishing and installing 2-inch curb stop and roadway box assembly will be made at the applicable unit price per assembly bid therefor in the schedule, which unit price shall include the cost of furnishing and placing the gravel; of furnishing rods and clamps for operating the curb stops; of making the connection between each curb stop and service piping; and of performing all excavation, backfill, and consolidating of backfill required for the installation of the curb stop and service-box assemblies and curb stop and roadway box assembly which is outside of the limits of the required excavation, backfill, and consolidating of backfill for the pipe trenches.

(f) Gate valves and valve-box assemblies.—Payment for furnishing and installing the various sizes of gate valve

and valve-box assemblies will be made at the applicable unit price per assembly bid therefor in the schedule; which unit price shall include the cost of making the connection to the piping, and of furnishing the T-handle socket wrenches for operating the gate valves.

(g) Water meter, valve, and meter manhole assemblies.—Payment for furnishing and installing 3-inch water meter, 3-inch valve, and meter manhole assembly and for furnishing and installing 10-inch water meter, 10-inch valve, and meter manhole assemblies will be made at the respective unit price per assembly bid therefor in the schedule, which unit price shall include the cost of furnishing all materials for the manholes, including cast-iron water meter manhole frames and covers; trap inlet drain, precast concrete manhole pipe and cones if used, cement; sand, coarse aggregate; reinforcement; gravel; cast-iron soil pipe; clay sewer pipe; and pipe sleeves; of constructing the manholes; of installing the trap inlet drain and cast-iron and clay pipe for the drain line; of furnishing and installing the water meters, valves and sleeve couplings; of connecting the water meters, valves, and sleeve couplings to the piping; of placing gravel in gravel pocket; of performing all excavation, backfill, and consolidating backfill for the drain line and gravel pocket; and of performing all excavation, backfill, and consolidating backfill required for the installation of the water meter manholes which is outside of the limits of the required excavation, backfill, and consolidating backfill for the pipe trenches.

[fol. 240] (h) Street washers.—Payment for furnishing and installing street washers will be made at the unit price per washer bid therefor in the schedule, which unit price shall include the cost of furnishing and placing the crushed stone or gravel; of making the connection to the piping; of performing all excavation, backfill, and consolidating of backfill required for installation of the street washer which is outside of the limits of the required excavation, backfill, and consolidating backfill for the pipe trenches; and of furnishing an operating key.

(i) Disinfecting water mains.—Payment for disinfecting water mains, if required, will be made at the lump-sum price bid therefor in the schedule, which lump-sum price shall include the cost of furnishing all materials and of furnishing any equipment and accessories required for performing the disinfecting.

[fol. 241]

SEWERAGE SYSTEM

111. *General.* The contractor shall furnish all materials for and shall construct and test a sewerage system (consisting of sewer mains with Y-branches, clean-outs, sewer manholes, and building sewers to demountable houses) for the community as shown on the drawings and as specified herein.

The sewerage system will extend to a point approximately 5 feet downstream from manhole 1 of the sewerage system.

Single Y-branches shall be installed along the entire length of sewer mains in blocks 1 and 2, and 4 to 15, both inclusive. Except for block 8, the Y-branches shall be installed to serve future residences on each side of the sewer mains and shall be installed with inlet legs of the Y-branches approximately 75 feet apart along both sides of the mains. In block 8, the Y-branches shall be located approximately 75 feet apart with the inlet legs of the Y-branches located to serve future residences on the west side of block 8 only.

A single Y-branch shall also be installed in the sewer main as required to serve the warehouse.

The contractor shall furnish the Government in addition to the quantities of clay sewer pipe which are furnished and installed under these specifications, the following minimum quantities of sewer pipe:

50 linear feet of 12-inch diameter clay sewer pipe;
50 linear feet of 10-inch diameter clay sewer pipe;
100 linear feet of 8-inch diameter clay sewer pipe;
50 linear feet of 6-inch diameter clay sewer pipe; and
50 linear feet of 4-inch diameter clay sewer pipe.

The additional sewer pipe furnished shall be of the same type and shall have the same type of joints as the clay sewer pipe installed under these specifications and shall be furnished in standard nominal laying lengths. The additional quantities of pipe shall be delivered to the Government at the Government warehouse.

Except where sewer mains cross under roads and streets, all pipe for the sewage collecting system shall be either bell-and-spigot clay sewer pipe with bituminous joints, or bell-and-spigot clay sewer pipe with interlocking mechanical compression-type joints. Sections of sewer mains under roads and streets shall be cast-iron soil pipe with bituminous joints and shall extend from sidewalk to sidewalk, or from gutter to gutter where there are no sidewalks.

The contractor at his option may substitute cast-iron water pipe WW-P-421a, type I, class 150, with bituminous joint in lieu of furnishing cast-iron soil pipe but such substitution shall not be at any increased cost to the Government.

[fol. 242] The contractor shall connect the building sewers to the building drains from demountable houses.

Grout and mortar shall be mixed in the proportions of 1 part of portland cement to 2 and ½ parts of sand and to the consistency prescribed by the contracting officer. Cement and sand for grout shall be in accordance with the provisions of Paragraphs 78 and 81, respectively. Before placing grout, the surfaces of existing concrete on which grout will be placed shall be roughened and shall be cleaned of all laitance, loose or defective concrete, coatings, and other foreign material by effective means followed by thorough washing. Such surfaces shall be kept moist for at least 24 hours immediately prior to the placing of the grout.

112. *Materials.* (a) Clay sewer pipe.—

(1) Bell-and-spigot clay sewer pipe with bituminous joints.—SS-P-361b, type I, class I, glazed or unglazed.

(2) Bell-and-spigot clay sewer pipe with interlocking mechanical compression-type joint.—The bell-and-spigot clay sewer pipe with interlocking mechanical

compression-type joints shall be either glazed or unglazed and shall be equal to Wedge-Lock clay pipe as manufactured by Pacific Clay Products, 1225 West 4th Street, Los Angeles 17, California.

(b) Cast-iron soil pipe.—WW-P-401, class A.

(c) Precast-concrete pipe and cones for manholes.—The precast-concrete pipe and cones for manholes shall be as shown on Drawing No. 39 (40-D-3968) and shall have an ultimate compressive strength of not less than 3,000 pounds per square inch.

(d) Bituminous joint compound.—Standard commercial quality for use with hot-poured joints. The joint compound shall adhere to cold, wet glazed clay or cast-iron sewer pipe; shall be dense, chemically inactive, and elastic; shall set quickly; and shall contain no filler which might settle out.

(e) Manhole frames and covers for sewer manholes.—The manhole frames and covers for the sewer manholes shall be cast-iron and shall have 21-inch minimum clear openings with solid covers. Manhole frames and covers shall be equal to Figure No. F-3240, Weight No. 1-A manhole frame and cover as shown on page 167 of Pipe Economy Catalog No. 56, of James B. Clow and Sons.

(f) Jute.—HH-P-117, type III.

(g) Cast-iron plugs and clay stoppers.—Cast-iron plugs and clay stoppers for sewer-pipe bells shall be of standard commercial quality.

[fol. 243] 113. *Data to be furnished by the contractor.* (a) General.—Before proceeding with procurement of cast-iron soil pipe and fittings, and clay sewer pipe and fittings, the contractor shall submit to the Government for approval, the following data: Catalogs, specifications, detailed descriptions, manufacturer's names and catalog numbers, and other applicable information covering the above materials which the contractor proposes to furnish. Where the data are in catalog form or several items are listed on the same sheet, the materials to be furnished shall be marked clearly and prominently.

The time allowed for approval of data submitted to the Government for approval shall be as provided in Paragraph 16.

The Government shall have the right to require the contractor to make changes in the materials which he proposes to purchase which the Government determines necessary to conform to the requirements and intent of these specifications. Approval by the Government of the contractor's data shall not be held to relieve the contractor of any part of the contractor's obligation to meet all of the requirements of these specifications.

(b) Mailing address.—Approval data required under Subparagraph (a) above shall be forwarded to the Assistant Commissioner and Chief Engineer, Bureau of Reclamation, Building 53, Denver Federal Center, Denver 2, Colorado, Attention: Code D-260. In addition to the above, the contractor shall forward a copy of his transmittal letter to the Project Construction Engineer, Bureau of Reclamation, Kanab, Utah.

(c) Costs.—The cost of submitting data to the Government shall be included in the prices bid in the schedule for the items in which the various materials are used.

114. *Laying and testing buried clay and cast-iron sewer lines.* (a) Laying pipe.—All clay and cast-iron sewer pipe for the sewer lines shall be laid true to the established lines and grades. All pipe shall be laid with the bell end upgrade. All pipe and fittings shall be fitted and matched so that there will be no unevenness along the lower inside half of the pipe.

Bell-holes shall be excavated, and the pipe shall be bedded carefully so as to be fully supported at all points over the bottom quarter of the circumference, and so as to have uniform bearing for the full length of the pipe, except at joints. Care shall be taken to prevent the weight of the pipe from resting on isolated boulders and other unyielding materials in the trench. Wood blocks or wedges may be used to aline the pipes and fittings, but after the joints are completed, the blocks or wedges shall be removed and the trench backfilled as specified to insure an even bearing

throughout the length of the pipe and fittings. Whenever the work ceases for any reason, all open ends shall be plugged with tight-fitting temporary plugs or covers. Except for cast-iron plugs which shall be placed at the top of riser pipes for sewer clean-outs, the contractor shall place clay stoppers in all unconnected ends of pipes and in all unconnected branches of fittings. The clay stoppers shall be grouted in place.

[fol. 244] During the process of laying the pipe, backfill shall be placed carefully and tamped to a depth of 1 foot over the top of the pipe and the remaining backfill shall be placed and consolidated as provided in Paragraph 55.

(b) Joints in sewer pipe.—

(1) Bituminous joints.—All bituminous joints in the bell-and-spigot clay sewer pipe or cast-iron soil pipe and between bell-and-spigot clay sewer pipe and cast-iron soil pipe shall be watertight joints of the poured type made with bituminous joint compound. The ends of the pipe shall abutt closely, and the spigot ends shall be placed concentrically in the hubs or bells. After the pipe and fittings have been carefully alined and bedded, the joints shall be packed with dry jute and thoroughly calked with suitable driving tools to a depth of approximately 25 percent of the length of the socket. The remaining space between the bell and spigot shall be poured full at one pouring of hot bituminous joint compound. The bells shall be free from grease, dirt, and water when the joints are poured. The hot joint compound shall be retained in the joints by joint runners of asbestos or other permanent material firmly placed before the joint compound is poured. The temperature of the joint compound shall not be lower than 350° F at the time of pouring. During the pouring operation, there shall be no cooled lumps or inequalities in the consistency of the heated material. The runners shall not be removed until at least 15 minutes after the joints have been poured.

Alternate joints may be made on the bank, in which event extra precaution shall be taken to assure satisfactory bedding for the pipe. When joints are made

on the bank with the pipe in a vertical position, runners will not be required, and the pipe shall not be moved for at least 30 minutes after the joint is poured.

(2) Interlocking mechanical compression joints.—The interlocking mechanical compression joints in clay sewer pipe and between cast-iron soil pipe and clay sewer pipe with interlocking mechanical compression joints shall be made in accordance with the recommendations of the manufacturer of the interlocking mechanical compression joint clay sewer pipe."

(c) Testing sewer lines.—Clay and cast-iron sewer lines shall be laid so that a clear unobstructed view exists between manholes and between ends of other straight runs of pipe. Where directed, any damaged pipe, pipe not laid to true line and grade, and pipe with defective joints shall be removed and properly replaced by the contractor without cost to the Government. The pipe shall be tested for smoothness of joints inside the pipe, especially in the invert, as the pipe is laid. Any projections into the interior of the pipe at the joints shall be cut away or, if directed, the pipe shall be removed, relaid, and the joint properly made.

[fol. 245] 115. *Sewer manholes.* (a) General.—Sewer manholes shall be constructed where shown on the drawings or where directed. Sewer manholes shall at the contractor's option be either cast-in-place concrete or precast-concrete manholes. The depth of the manholes shall be as shown on the drawings.

(b) Cast-in-place manholes.—Cast-in-place concrete manholes shall be constructed in accordance with the details shown on Drawing No. 39 (40-D-3968). The concrete shall conform to the applicable provisions of Paragraphs 77 to 93.

(c) Precast manholes.—Precast-concrete manholes shall be constructed as shown on Drawing No. 39 (40-D-3968). The base slabs of the precast-concrete manholes shall be cast-in-place concrete base slabs. The barrel of the manholes shall consist of precast-concrete manhole pipe and

cones as shown on Drawing No. 39 (40-D-3968). The bottom of the lower pipe section shall be cut square to fit the base and all joints shall be made with cement mortar. Where sewer pipe enters the manhole above the elevation of the base slab, the necessary holes in the manhole barrel shall be cut neatly and accurately to receive the sewer pipe and joints between the sewer pipe and manhole barrel shall be filled with grout. Adjustment brick or precast-concrete-pipe sections shall be used at the top of the manholes as shown on Drawing No. 39 (40-D-3968) where required for setting the manhole frames and covers at the required elevation. If adjustment brick are used, the brick shall be laid with full mortar beds and with all vertical joints filled completely with mortar. The interior of the manholes shall be equipped with ladder rungs or steps equivalent to those shown on the drawings. Concrete for base slabs shall conform to the applicable provisions of Paragraphs 77 to 93.

116. *Sewer clean-outs.* The contractor shall install clay sewer-pipe clean-outs where shown on the drawings.

Each sewer clean-out shall include an eighth-bend, riser pipe, cast-iron plug at the top end of the riser pipe, and a clay stopper at the end of the sewer line, all as shown on Drawing No. 39 (40-D-3968). Joints in the sewer clean-outs shall be either hot-poured bituminous joints or cement mortar joints at the contractor's option. The hot-poured bituminous joints shall be as specified in Subparagraph 114(b). The clean-outs shall be encased in concrete as shown on the drawings. Concrete shall be in accordance with the applicable provisions of Paragraphs 77 to 93. Cast-iron plugs and clay stoppers shall be tight fitting. The clay stoppers at the end of the sewer pipe shall be grouted in place. The cast-iron plugs at the top end of the clean-out riser pipe will require only setting in place.

117. *Measurement and payment.* (a) Pipe and fittings for sewer lines.—Measurement for payment for furnishing and laying the various types and sizes of pipe and fittings for sewer lines will be made along the center line of the pipe and fittings in place and from center to center of

intersecting lines, with no allowance being made for laps at joints.

[fol. 246] Payment for furnishing and laying the various sizes of clay sewer pipe and fittings for the sewage collecting system and for furnishing and laying the various sizes of cast-iron soil pipe and fittings for the sewage collecting system will be made at the respective unit price per linear foot bid therefor in the schedule, which unit price shall include, as applicable, the cost of laying and jointing the pipe; placing and connecting all fittings; of making connections to the demountable house building drains, and of testing the completed lines. Payment for furnishing additional sewer pipe will be made under the lump-sum price bid in the schedule for furnishing additional water and sewer pipe.

(b) Sewer manholes.—Measurement for payment for constructing sewer manholes will be made from the top of the manhole covers to the bottom of the base slabs. Payment for constructing sewer manholes 4 feet and less in depth will be made at the unit price per manhole bid therefor in the schedule, which unit price shall include the cost of constructing the manholes complete as shown on the drawings, including the cost of embedding the sewer pipe in concrete and of cutting required openings in precast-concrete manhole barrel-sections and of grouting the sewer pipe in the openings; of laying all required brick; and of furnishing all materials for the manholes, including manhole frames and covers, precast-concrete manhole barrel sections if used, brick, ladder rungs or steps, reinforcement bars, sand, coarse aggregate, cement and other materials, except sewer pipe.

Payment for constructing each additional foot of sewer manhole of major fraction thereof, below 4-foot depth will be made at the unit price per linear foot bid in the schedule for constructing each additional foot of sewer manhole below 4-foot depth, which unit price shall include the cost of constructing each additional foot of sewer manhole; of furnishing all materials, including ladder rungs, precast-concrete manhole barrel sections, if used, reinforcement bars, sand, coarse aggregate, and cement.

The unit prices bid in the schedule for constructing sewer manholes 4 feet and less in depth and for constructing each additional foot of sewer manhole below 4-foot depth shall include the cost of all excavation, backfill and consolidating backfill required for the construction of the manholes which are outside of the limit of the required excavation, backfill, and consolidating backfill for the sewer-pipe trenches. Payment for furnishing and laying the clay sewer pipe at manholes will be made at the applicable unit price per linear foot bid in the schedule for furnishing and laying sewer pipe.

(c) Sewer clean-outs.—Payment for furnishing and installing sewer clean-outs will be made at the unit price per clean-out bid therefor in the schedule, which unit price shall include the cost of furnishing all materials, including cement; of encasing the clean-outs in concrete; of installing the cast-iron plugs and clay stoppers; and of performing all excavation, backfill, and consolidating backfill required for construction of the clean-outs which are outside of the limits of the required excavation, backfill, and consolidating backfill for the sewer-pipe trenches.

* * * * * * *

PACIFIC STATES CAST IRON PIPE CO.

MANUFACTURERS OF

MC WANE PRECALKED JOINT AND PACIFIC OPEN BELL PRESSURE PIPE

GATE VALVES AND FIRE HYDRANTS

GENERAL OFFICE AND FOUNDRIES

PROVO, UTAH

SALES OFFICE

Salt Lake City, Utah
May 23, 1957

Quotation No.

TO: CONTRACTORS

BID DATE: May 28, 1957 10:00 A.M.

Page, Arizona

SUBJECT: GLEN CANYON UNIT, ARIZONA-UTAH - MIDDLE RIVER DIVISION
COLORADO RIVER STORAGE PROJECT - BIDDING SCHEDULE FOR
SPECIFICATIONS NO. DC 4896 ACCESS ROADS STREETS AND UTILITIES

WE ARE PLEASED TO QUOTE YOU ON MATERIALS SET FORTH BELOW CONFORMING TO SPECIFICATIONS IN OUR CATALOG AND SUBJECT TO THE TERMS AND CONDITIONS AS MENTIONED ON THE BACK OF THIS SHEET AND HEREBY MADE A PART HEREOF ON THIS PROPOSAL, EXCEPT AS HEREINAFTER MODIFIED:

	BID ITEM NO. 48			
13,000'	6"x18' C.I. Pipe Cl150 Tyton Joint	Per Ft.	1.965	25,545.00
3	6" B&S 45° Bends M. J.	Each	14.90	44.70
15	6" C.I. AB MJ Tee	Each	30.42	456.30
5	6" C.I. MJ Plug	Each	5.09	25.45
2	6" C.I. AB MJ Cross	Each	39.24	78.48
1	6" C.I. MJ Plug Tap 2½" I.P.S.	Each	6.66	6.66
	BID ITEM NO. 49			
19,000'	8"x18' C.I. Pipe Cl. 150 Tyton Joint	Per Ft.	2.815	53,485.00
25	8"x6" C.I. AB MJ Tee	Each	40.86	1,021.50
1	8" C.I. AB MJ Tee	Each	43.07	43.07

(Continued on Sheet No. 2)

[fol. 247]

EXHIBIT 7(b)

TERMS AND CONDITIONS

1—Quotations are for immediate acceptance only and subject to change without notice.

2—Agreements are contingent upon strikes, fires, accidents, car shortage, or any other causes beyond our control.

3—Shipping promises count from receipt at foundry of full manufacturing and shipping details; they are based upon present expectations but are not guaranteed. Material in stock is offered subject to prior sale.

4—Delivery is to be made F. O. B. seller's foundry, upon which seller's responsibility ceases.

5—Freight charges when included in the selling price, are to be paid by the buyer. Freight allowance is based on a specific rate to agreed destination and when shipments are forwarded freight collect the amount of freight is to be deducted by us on the face of the invoice. Consignee assumes the risk in paying any additional charges without our consent.

6—PAYMENT: Net cash in Provo, Utah, unless otherwise agreed in writing.

7—CLAIMS: All claims for corrections or deductions must be made within ten days after receipt of goods.
All material is rigidly tested and inspected at the foundry and is carefully loaded. Seller agrees to replace at agreed point of delivery any material proven defective, or which does not conform to the specifications shown in the order placed in acceptance of this quotation.
The measure of the damage is the price of defective material only. No charge for labor or expense required to repair defective material, or for any consequential damages, will be allowed.
Claims for breakage or loss in transit must be filed with the carrier's agent promptly, as the Inter-State Commerce Commission prohibits carriers from paying loss or damage claims unless such claims are filed with them within four months after delivery date. It is impossible to collect for damaged or lost articles unless you have the original bill of lading and the original receipted freight bill with exception showing the loss or damage and signed by the carrier's agent. In case of damage by the carrier, we will, if desired, make claim on behalf of our customers, provided we are supplied with the necessary data to substantiate the claim.

8—When orders have been filled as specified, no goods may be returned, nor will any credit be allowed, unless our consent has first been secured, and all goods returned will, if accepted, be credited less the cost of handling and the freight and cartage expenses incurred.

9—All orders submitted to us through our division sales offices, sales agents, or direct to the general office by the buyer, must be subject to the approval of the Vice-President, Treasurer, or General Sales Manager of the Pacific States Cast Iron Pipe Company at Provo, Utah, for final acceptance.

10—Unless assented to by the proper official of our compar , in writing, no terms or conditions at variance with, or in addition to, those indicated herein shall apply to any transaction resulting from this quotation.

PACIFIC STATES CAST IRON PIPE CO

	BID ITEM NO. 49 Cont.			
2	8" C.I. B&S 22½° Bend MJ	Each	22.32	44.64
1	8" C.I. B&S 45° Bend MJ	Each	22.32	22.32
1	6"x8"x8" C.I. AB Later Wye MJ	Each	104.34	104.34
2	8" C.I. B&S 11¼° Bend MJ	Each	22.32	44.64
4	8" C.I. AB Cross MJ	Each	55.76	223.04
3	8"x8"x6"x6" C.I. AB Cross MJ	Each	50.58	151.74
4	8" C.I. AB MJ Tee	Each	43.07	172.28
1	8" C.I. MJ Plug Tap 2" I.P.S.	Each	9.27	9.27
5	8 x 6 B&S Reducer SEB	Each	18.59	92.95
	BID ITEM NO. 50			
5,000'	10" x 18' C.I. Pipe Tyton Jt. Cl. 150	Per Ft.	3.71	18,550.00
7	10"x6" C.I. AB Tee MJ	Each	55.17	386.19
2	10" C.I. B&S 11¼° Bend MJ	Each	31.10	62.20
1	10"x10"x8"x8" C.I. AB Cross MJ	Each	70.29	70.29
1	10"x8" C.I. AB Tee MJ	Each	58.28	58.28
1	10"x8" C.I. AB Tee MJ	Each	58.28	58.28
1	10"x8" B&S Red. SEB MJ	Each	25.79	25.79
	BID ITEM NO. 51			
2,100'	12"x18' C.I. Pipe Cl. 150 Tyton Jt.	Per Ft.	4.755	9,985.50
1	12" x 10" C.I. AB Tee MJ	Each	80.42	80.42
1	12"x6" C.I. AB Tee MJ	Each	70.07	70.07
1	12" x 10" C.I. AB MJ Cross	Each	96.08	96.08
1	12" x 8" B&S Reducer SEB MJ	Each	33.12	33.12
1	10 x 8 B&S Reducer SEB MJ	Each	25.79	25.79

	BID ITEM NO. 52			
2,700'	14" x 18' C.I Pipe Cl. 150 Tyton Jt.	Per Ft.	6.205	16,753.50
4	14" C.I. B&S 11¼° Bend MJ	Each	102.96	411.84
1	14" C.I. Double Hub Tap 3" I.P.S.	Each	145.86	145.86
2	14"x6" C.I. AB Tee MJ	Each	147.72	295.44
1	14"x12"x8" C.I. AB Tee MJ	Each	228.96	228.96
	BID ITEM NO. 53			
58	5" V.O. Fire Hydrants 2'-0" Bury, 6" Flg Bottom Conn., 2-2½" NST Nozzle, 1-4½" NST Streamer	Each	141.80	8,224.40
58	6" Flg x MJ Hub Aux. Gate Valve W/2" ON	Each	60.48	3,507.84
6	Fire Hydrant Op. Wrenches	Each	1.22	7.32
	BID ITEM NO. 64			
42	6" Hub End MJ Gate Valve N.O.S. O.L.	Each	60.08	2,523.36
	BID ITEM NO. 65			
27	8" Hub End MJ Gate Valve N.O.S. O.L.	Each	91.04	2,458.08
	BID ITEM NO. 66			
3	10" Hub End MJ Gate Valve N.O.S. O.L.	Each	142.07	426.21
	BID ITEM NO. 67			
2	12" Hub End MJ Gate Valve N.O.S. O.L.	Each	185.67	371.34
	BID ITEM NO. 68			
1	14" Hub End MJ Gate Valve N.O.S. O.L.	Each	422.57	422.57

	BID ITEM NO. 69			
1	3" Flg Gate Valve N.R.S. O.L. w/HW	Each	29.48	29.48
	BID ITEM NO. 70			
2	10" Flg. Gate Valve N.R.S. O.L. w/HW	Each	139.28	278.56
	BID ITEM NO. 72 TO 80		NO BID	
	BID ITEM 82, 83 & 84		NO BID	
	BID ITEM NO. 85			
54'-6"	14" x 18'-2" C.I. Pipe Tyton Jt.	Per Ft.	6.205	338.17
54'-6"	12" x 18'-2" C.I. Pipe Tyton Jt.	Per Ft.	4.755	259.15
54'-6"	10" x 18'-2" C.I. Pipe Tyton Jt.	Per Ft.	3.71	202.20
109'-0"	8" x 18'-2" C.I. Pipe Tyton Jt.	Per Ft.	2.815	306.84
109'-0"	6" x 18'-2" C.I. Pipe Tyton Jt.	Per Ft.	1.965	214.19
	ALTERNATE PRICES FOR BOLTITE (MECH JOINT) CAST IRON PIPE			
	BID ITEM NO. 48			
13,000'	6" x 18' C.I. Pipe Class 150 Boltite (Mech. Joint) WWP421A	Per Ft.	2.085	27,105.00
	BID ITEM NO. 49			
19,000'	8" x 18' C.I. Pipe Class 150 Boltite (Mech. Joint) WWP 421A	Per Ft.	2.965	56,335.00
	BID ITEM NO. 50			
5,300'	10" x 18' C.I. Pipe Class 150 Boltite (Mech. Joint) WWP421A	Per Ft.	3.90	20,670.00
	BID ITEM NO. 51			
2,100'	12" x 18' C.I. Pipe Class 150 Boltite (Mech. Joint) WWP421A	Per Ft.	4.995	10,489.50

[fol. 251]

	BID ITEM NO. 52			
2,700'	14" x 18' C.I. Pipe Class 150 Bolt ite (Mech. Joint) WWP 421A	Per Ft.	6.545	17,671.50
	BID ITEM NO. 85			
54'	14" x 18' C.I. Pipe Class 150 Bolt ite (Mech Joint) WWP421A	Per Ft.	.545	353.43
54'	12" x 18' C.I. Pipe Class 150 Bolt ite (Mech Joint) WWP421A	Per Ft.	4.995	269.73
54'	10" x 18' C.I. Pipe Class 150 Bolt ite (Mech Joint) WWP421A	Per Ft.	3.90	210.60
109'	8" x 18' C.I. Pipe Class 150 Bolt ite (Mech Joint) WWP421A	Per Ft.	2.965	323.19
109'	6" x 18' C.I. Pipe Class 150 Bolt ite (Mech Joint) WWP421A	Per Ft.	2.085	227.27

PACIFIC STATES CAST IRON PIPE

To CONTRACTORS May 23, 1957 Sheet No. 6

TERMS: Net 30 Days

Shipment could begin in 10 days after receipt of order and be completed as needed by contractor

F.O.B. Prices are quoted f.o.b. Foundry Provo, Utah with full Truck load Freight allowed in 34,000# Minimum Load to Page, Arizona.

Prices are firm for any shipments made through June 30th 1957. After which date we will increase our prices $2.00 per ton for each 1.00 per ton increase in the price of Pig Iron. This increase will not excede $6.00 per Ton.

There are no agreements or verbal understandings outside of this proposal. The foregoing shall become a contract agreement only when accepted by you as purchaser and approved in writing by an executive officer of our company at our home office at Provo, Utah. And subject to the Terms and Conditions printed on the back of the first sheet of this quotation.

PACIFIC STATES CAST IRON PIPE COMPANY

PER: WATERWORKS EQUIPMENT CO.,
District Manager
Dale H. Stephens

To the PACIFIC STATES CAST IRON PIPE CO.

Your proposal as above is hereby accepted this

..... day of 19

.....

By .....
(Title)

APPROVED AT PROVO, UTAH, this

..... day of 19

By .....
Vice-President and Treasurer

[Tot 253]

GEO. A. SIMS MILTON K. SIMS ELMER J. SIMS G. GRANT SIMS

SALT LAKE TRANSFER COMPANY

ESTABLISHED 1880

Rapid Efficient Transportation

ONE OF THE LARGEST AND OLDEST TRANSFER COMPANIES IN THE WEST

170 WEST SECOND SOUTH STREET • PHONE EM 4-3515
SALT LAKE CITY 1, UTAH

May 7, 1957

Mr. Karl D. Eagar, Sales Dept.
Pacific States Cast Iron Pipe Co.
P.O. Box 18
Provo, Utah

Dear Mr. Eagar:

In answer to your letter of May 6th, I am pleased to state that we have authority to haul pipe from Ironton, Utah to Page, Arizona. Over the present route from Ironton to Page our rate is $1.12 per CWT on 38,000 pound minimum.

An access road to Page, Arizona via Bitter Springs is now under construction and when completed will shorten the distance and thus reduce our rate. This road is scheduled for completion in about 9 months. When the road is completed our rate will be $1.04 per CWT on 38,000 pound minimum.

I hope that the above rates are satisfactory and that you will call for our service.

Very truly yours,

J. H. Ollinger

J.H. Ollinger

May 6, 1957

Salt Lake Transfer Company
170 West Second South
Salt Lake City, Utah

Gentlemen:

We understand that you have a rate of $1.12 cwt. on 38,000 pound minimum into the Glen Canyon Dam Town Site of Page, Arizona. Since there will be quite abit of building in this area in the near future, we are, naturally, interested in furnishing the cast iron pipe for the water distribution system.

Will you please tell us whether our information concerning the above mentioned rate is correct and also whether you have the authority to haul pipe from our foundry in Ironton, Utah, to Page, Arizona.

Very truly yours,

PACIFIC STATES CAST IRON PIPE CO.

Sales Department

KBE:lg

MAIN OFFICE AND TERMINAL
634 SOUTH THIRD WEST
SALT LAKE CITY 4 UTAH

UTAH-ARIZONA FREIGHT LINES

Division of CONSOLIDATED FREIGHTWAYS, INC.

Salt Lake City, Utah
April 30, 1957

Mr. T. L. Johnson, Sales Manager
Pacific States Cast Iron Pipe Co.
P. O. Box 18
Provo, Utah

Dear Len:

With reference to your letter of April 26th, requesting the rates on cast iron pipe to the Glen Canyon Dam Townsite of Page, Arizona, following are the rates available at the present time.

In Rocky Mountain Tariff No. 32, a rate of $1.24 per cwt. on 40,000 lb. minimum will become effective May 22, 1957. I do find however that Salt Lake Transfer have authority to haul this pipe and according to their rates as named in Intermountain Tariff 5-F, their rate from Ironton to Page based on 430 miles, is $1.12 per cwt. on 38,000 lbs. minimum. We are docketing a rate proposal today to meet this rate.

We do not as yet have authority to serve this damsite project but are hopeful that we will receive it and as soon as we get any information concerning this, I will advise you. In the meantime, we will appreciate any information concerning your needs and we will be very happy to handle any necessary tariff work to establish rates needed.

Yours very truly,

UTAH ARIZONA FREIGHT LINES

Guy R. Cutler

Guy R. Cutler

GRC:g

Memo to
Salt Lake Transfer

Division of CONSOLIDATED FREIGHTWAYS, INC.

Salt Lake City, Utah
April 30, 1957

Mr. T. L. Johnson, Sales Manager
Pacific States Cast Iron Pipe Co.
P. O. Box 18
Provo, Utah

Dear Len:

With reference to your letter of April 26th, requesting the rates on cast iron pipe to the Glen Canyon Dam Townsite of Page, Arizona, following are the rates available at the present time.

In Rocky Mountain Tariff No. 32, a rate of $1.24 per cwt. on 40,000 lb. minimum will become effective May 22, 1957. I do find however that Salt Lake Transfer have authority to haul this pipe and according to their rates as named in Intermountain Tariff 5-F, their rate from Ironton to Page based on 430 miles, is $1.12 per cwt. on 38,000 lbs. minimum. We are docketing a rate proposal today to meet this rate.

We do not as yet have authority to serve this damsite project but are hopeful that we will receive it and as soon as we get any information concerning this, I will advise you. In the meantime, we will appreciate any information concerning your needs and we will be very happy to handle any necessary tariff work to establish rates needed.

Yours very truly,

UTAH ARIZONA FREIGHT LINES

Guy R Cutler

Guy R. Cutler

GRC:g

Memo to
Salt Lake Transfer

Mr. Guy Cutler
Utah-Arizona Freightlines
634 South Third West
Salt Lake City, Utah

Dear Guy:

We will shortly be figuring prices on a very substantial quantity of cast iron pipe for a new water distribution system at the Glen Canyon Townsite of Page, Arizona. In this connection we, of course, need the latest and best freight rates available from our plant to Page. Please give us this information at your earliest convenience. We certainly should have it within the next week to ten days.

Yours very truly,

PACIFIC STATES CAST IRON PIPE CO.

Sales Manager

TLJ:khs

INTER-OFFICE MEMO

PACIFIC STATES CAST IRON PIPE COMPANY

FSCIPCO

FROM Salt Lake City, Utah DATE April 26, 1957

TO Provo, Utah ATTENTION OF T. L. Johnson

SUBJECT Bureau of Reclamation, Page, Arizona

Dear Len:

Enclosed is a copy of our take off on materials for water distribution system at Page, Arizona.

As soon as you have an opportunity, let us know how you would like us to quote and we will finish preparing our quotation.

Very truly yours,

Dale H. Stephens*lf

Encl.

Pscipco Materials for Page Arizona

13,000'	6" x 18' Cl. 150 Tar Coated Cast Iron pipe w/Tyton Joint
19,000'	8" x 18' Ditto
5,300'	10" x 18' Ditto
2,100'	12" x 18' Ditto
2,700'	14" x 18' Ditto
3	6" B & S 45° Boltite Bends
15	6" A B Boltite Tees
2	6" A B Boltite Cross
5	6" Boltite Plugs
1	6" Boltite Plugs Tapt 2½" IPT
25	8 x 6 A B Boltite Tee
4	8" A B Boltite Tees
1	8 x 6 x 8 A B Boltite Tees
3	8 x 8 x 6 x 6 A B Boltite Cross
4	8 x 8 x 8 x 6 A B Voltite Cross
1	6 x 8 x 8 BSB 45° Boltite Wye
1	8" B & S 45° Boltite Bend
2	8" B & S 22½° Boltite Bend
2	8" B & S 11¼° Boltite Bend
1	8" Boltite Plug Tapt 2" IPT
7	10 x 6 A B Boltite Tees
1	10 x 8 A B Boltite Tee
1	10 x 8 x 8 A B Boltitie Tee
1	10 x 10 x 8 x 8 AB Boltite Cross
1	10" B & S 11¼° Boltite Bend
1	12 x 10 A B Boltitie Tee
1	12 x 16 A B Boltite Tee
1	12 x 8 x 10 x 8 A B Boltitie Cross
2	14 x 6 A B Boltite Tee
1	14 x 12 x 8 A B Boltite Tee
1	14" Boltite Double Hub Tapt 3" IPT One side
4	14" B & S 11¼° Boltite Bend
25	5" V.O. Fire Hydrants - 2' Bury - 6" Flanged bottom conn. - 2 -2½" NST nozzle, 1 - 4½" NST steamer nozzle - 1½" pent. oper nut open left w/
25	6" List 4 Boltite Hub x flange aux. gate valves NOS O.L.
1	3" List 4 S.E. Gate Valve NOS O.L.
42	6" List 4 Boltite Hub End Gate Valves NOS O,L,
27	8" Ditto
3	10" Ditto
2	12" Ditto
1	14" Ditto
1	3" List 4 flanged gate valve w/ wheel handle O.L.
2	10" Ditto
4	10" x 18" C.I. Flg. Spigot pieces
6	Fire hydrant operating wrenches

Glen Canyon Dam Town Site
Page, Arizona
WWP 421 — Letting May 28th
thru Arizona

13000' 6" Cl. 150 WWP421-a MJ or Tyton
1900' 8" " " " "
530' 10" " " " "
* 210' 12" " " " "
* 270' 14" " " " "
25 Hyd 5' V.O. w/ Flex Valves

* a-c alternate — Bal. C.I. only

42 — 6" MJ Valves
27 — 8"
5 — 10"
2 — 12"

INTER-OFFICE MEMO

PACIFIC STATES CAST IRON PIPE COMPANY

FROM Office: Salt Lake City — DATE: April 25, 1957

TO Office: Provo — ATTENTION OF: T. L. Johnson

SUBJECT: U. S. BUREAU OF RECLAMATION
PAGE, ARIZONA WATER DISTRICT SYSTEM

Dear Len:

Enclosed are two copies of specs and one copy of bid form for the Page, Arizona water distribution system. You will note from the specs that this is a very nice cast iron job since all of the pipe 6" through 10" must be cast iron. The 12" and 14" can be either cast iron or cement asbestos.

The townsite of Page, Arizona is located approximately 150 miles north of Flagstaff and about the same distance from the railhead at the south rim of Grand Canyon.

Our truck route would be about 75 miles south and east of Kanab providing they have the new bridge completed in time otherwise, we would have to go about 130 miles from Kanab to Page via Jacobs Lake.

This is a very attractive job and I hope you have a nice sharp pencil when you start to figure prices.

Very truly yours,

Dale

Dale H. Stephens*b

Form 149 Rev

INTER-OFFICE MEMO

APR 29 8 AM '57 PACIFIC STATES CAST IRON PIPE COMPANY

FROM Denver Office PSCIPCO DATE April 25, 1957

TO Provo Office ATTENTION OF T. L. Johnson

SUBJECT U. S. BUREAU OF RECLAMATION
FLAMING GORGE AND GLEN CANYON PROJECTS
BIDS JUNE 4 AND MAY 28 RESPECTIVELY

Dear Len:

I am obtaining today copy of specification No. DC4897 for the Flaming Gorge project and DC4896 for the Glen Canyon project. I will take the specifications for the Glen Canyon project to Salt Lake City with me tomorrow and give it to the Waterworks Equipment boys and I will send the other one to you with this memo so you can take a look at it before sending it for the necessary data to the Los Angeles office.

If either the Waterworks Equipment Company or your Los Angeles office has difficulty in obtaining a list of prospective bidders, I will be glad to get the list from the Reclamation offices here.

Very truly yours,

Dana E. Kepner

DEK:ct
Encl.

P. S. In talking with Mr. Judd and Mr. Becker at the Reclamation Bureau office this afternoon, I find they have a hurry-up job on which they expect to issue invitations for bids on May 24* for the Navajo project to be located near Farmington, New Mexico. This will apparently be in my territory and I will check into it and advise you more about it later.

D. E. K.

* Invitations to be issued on May 24 *
bids about a month thereafter.
DEK

[fol. 262]

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930 and June 15, 1941.)

3rd SHEET

THIS MEMORANDUM is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading nor a copy or duplicate covering the property named hereon, and is furnished solely for filing or record.

Shipper's No. 1

Agent's No.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

at **IRONTON, UTAH** 28033 4-7-58 **31 Mar.**, 19 **58**

from **PACIFIC STATES CAST IRON PIPE CO.**

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to it's usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to **W.W. Clyde Const. Co.** (Mail or street address of consignee—For purposes of notification only)

Destination **Page** State of **Arizona** County of

Route **Called** NONE

Class or Rate Car Initial Car No.

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)
66	6"x18' ASA 2 Tyton Joint EL Pipe	33,186#
66	6" Tyton Gaskets	33
2	Qts. Tyton Lub.	4
	TOTAL	33,223#

ORDER COMPLETE

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

EXHIBIT 7(d)

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to W.W. Clyde Const. Co. (Mail or street address of consignee—For purposes of notification only)

Destination Page State of Arizona County of

Route Called NONE

Class or Rate Car Initial Car No.

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)
66	6"x18' ASA 72 Tyton Joint EL Pipe	33,186#
66	6" Tyton Gaskets	33
2	Qts. Tyton Lub.	4
	TOTAL	33,223#

ORDER COMPLETE

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

PACIFIC STATES CAST IRON PIPE CO. Shipper. Agent.

Per Per

Permanent postoffice address of Shipper PROVO, UTAH

3

69896

10M 2.57 BABCO

[Pl. 283]

EXHIBIT 7 (cd)

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, of property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: *Provided*, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and lading at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where perishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: *Provided*, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: *Provided*, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: *Provided*, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignee (except as hereinafter provided) shall not be liable for such charges. *Provided*, That, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property, and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property, but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or

or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed. And suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property, shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance. Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and bagging at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier. Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or tram or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property, but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property, and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property. But if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire, happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, tranship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

8-17

Provo

June 21, 1957

Weco

Mr. Dale Stephens

GLEN CANYON DAM JOB
PAGE, ARIZONA

On the basis of increasing prices we quoted this job by the maximum escalated amount, the following higher prices result:

	MECHANICAL JOINT	TYTON JOINT
14"	$6.78	$6.44
12"	5.18	4.94
10"	4.04	3.85
8"	3.07	2.92
6"	2.16	2.04

This job was figured using a truck rate of $22.40 per ton. If W. W. Clyde wishes to haul this on his own equipment, we will allow this much to him. This freight allowance amounts to the following per foot:

14"	$.90 ft.
12"	.71 "
10"	.55 "
8"	.415"
6"	.285"

We are now in the position of having to manufacture everything that we sell. In other words, our stock of pipe has completely disappeared. We expect to have some backlog of orders by the time our plant resumes operations July 15. In view of this, we urge you to get Mr. Clyde to place his order promptly so that he will experience no delay in receiving materials he will need to keep his job going.

Yours very truly,

Sales Manager

TLJcb

Completed card 8-9-57

Form 18-A

PACIFIC STATES CAST IRON PIPE CO.

INVOICE

MANUFACTURERS OF CENTRIFUGAL, SAND AND PIT CAST PRESSURE PIPE • GATE VALVES • FIRE HYDRANTS

General Office and Foundries — P. O. Box 18, Provo, Utah

cb

ORDER NO SL-73433-A
ORDER DATE April 7, 1958
YOUR ORDER
YOUR REQ

15T

ORDER NO SL-73433-A
INVOICE NO 28663
INVOICE DATE APR 7 58

SOLD TO W. W. Clyde Construction Company
Springville,
Utah

CAR NO

SHIPPED MAR 31

SHIP TO Same: Page, Arizona

ROUTE CUSTOMER'S TRUCK

RATE

R R DESTINATION

FINAL DESTINATION PAGE, ARIZONA

F O B FOUNDRY

TERMS 30 DAYS NET ON 15th

DESCRIPTION & QUANTITY ORDERED		QUANTITY SHIPPED PIECES	QUANTITY SHIPPED FEET	UNIT PRICE	AMOUNT
66 Pcs. 6"x18'	Class 150, TYTON JOINT, THIN CEMENT LINED, SEAL COATED, SUPER DELAVAUD Cast Iron Pipe. ASA Spec. Wt. per foot 25.5#; Wt. per length 460# 1188'	66	11 88	$1.755 ft.	2084 94
66 " 6"	Tyton Gaskets	66		N/C	
2 Quarts	Tyton Lubricant	02		N/C	
					2084 94
		WECO 2½	2084 94	52 12	

Vol. 200

EXHIBIT

ORDER NO SL-73433-A
ORDER DATE April 7, 1958
YOUR ORDER
YOUR REQ

15T

ORDER NO SL-73433-A
INVOICE NO 28663
INVOICE DATE APR 7 58

CAR NO

SHIPPED MAR 31

SOLD TO W. W. Clyde Construction Company
Springville,
Utah

SHIP TO Same: Page, Arizona

ROUTE CUSTOMER'S TRUCK

RATE

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FINAL DESTINATION PAGE, ARIZONA

F O B FOUNDRY

TERMS 30 DAYS NET

DESCRIPTION & QUANTITY ORDERED		QUANTITY SHIPPED PIECES	QUANTITY SHIPPED FEET	UNIT PRICE	AMOUNT
66 Pcs. 6"x18'	Class 150, TYTON JOINT, THIN CEMENT LINED, SEAL COATED, SUPER DELAVAUD Cast Iron Pipe. ASA Spec. Wt. per foot 25.5#; Wt. per length 460# 1188'	66	1188	@1.755 ft.	2084 94
66 " 6"	Tyton Gaskets	66		N/C	
2 Quarts	Tyton Lubricant	02		N/C	
					2084 94
		WECO 2½	2084 94		52 12

TERMS AND CONDITIONS OF THIS SALE ARE PRINTED ON THE BACK OF THIS INVOICE, AND ARE MADE A PART HEREOF.
ALL CLAIMS FOR WHICH WE MAY BE RESPONSIBLE MUST BE MADE WITHIN 10 DAYS FROM RECEIPT OF SHIPMENT.
FREIGHT ALLOWANCE IS BASED ON RATE QUOTED. CONSIGNEE ASSUMES RISK IN PAYING ANY ADDITIONAL AMOUNT WITHOUT OUR AUTHORITY. IN ORDER FOR YOU TO COLLECT FOR LOSS OR DAMAGE IN TRANSIT, NOTATION MUST BE MADE BY FREIGHT AGENT ON PAID EXPENSE BILL. DEDUCTIONS FROM THIS INVOICE FOR LOSS OR DAMAGE CANNOT BE ALLOWED.
BY ORDER OF INTERSTATE COMMERCE COMMISSION, CARRIERS CANNOT PAY CLAIMS FOR LOSS OR DAMAGE UNLESS FILED WITH THEM WITHIN FOUR (4) MONTHS AFTER DELIVERY OF SHIPMENT, OR IN CASE OF FAILURE TO DELIVER, THEN WITHIN FOUR (4) MONTHS AFTER REASONABLE TIME FOR DELIVERY HAS ELAPSED.
We, the undersigned, do hereby guarantee that the articles or commodities listed herein were produced or manufactured in accordance with the Federal Child Labor Act of September 1, 1916.

PACIFIC STATES CAST IRON PIPE CO.

EXHIBIT 7(e)

TERMS AND CONDITIONS

1—Quotations are for immediate acceptance only and subject to change without notice.

2—Agreements are contingent upon strikes, fires, accidents, car shortage, or any other causes beyond our control.

3—Shipping promises count from receipt at foundry of full manufacturing and shipping details; they are based upon present expectations but are not guaranteed. Material in stock is offered subject to prior sale.

4—Delivery is to be made F. O. B. seller's foundry, upon which seller's responsibility ceases.

5—Freight charges when included in the selling price, are to be paid by the buyer. Freight allowance is based on a specific rate to agreed destination and when shipments are forwarded freight collect the amount of freight is to be deducted by us on the face of the invoice. Consignee assumes the risk in paying any additional charges without our consent.

6—PAYMENT: Net cash in Provo, Utah, unless otherwise agreed in writing.

7—CLAIMS: All claims for corrections or deductions must be made within ten days after receipt of goods.
All material is rigidly tested and inspected at the foundry and is carefully loaded. Seller agrees to replace at agreed point of delivery any material proven defective, or which does not conform to the specifications shown in the order placed in acceptance of this quotation.
The measure of the damage is the price of defective material only. No charge for labor or expense required to repair defective material, or for any consequential damages, will be allowed.
Claims for breakage or loss in transit must be filed with the carrier's agent promptly, as the Inter-State Commerce Commission prohibits carriers from paying loss or damage claims unless such claims are filed with them within four months after delivery date. It is impossible to collect for damaged or lost articles unless you have the original bill of lading and the original receipted freight bill with exception showing the loss or damage and signed by the carrier's agent. In case of damage by the carrier, we will, if desired, make claim on behalf of our customers, provided we are supplied with the necessary data to substantiate the claim.

8—When orders have been filled as specified, no goods may be returned, nor will any credit be allowed, unless our consent has first been secured, and all goods returned will, if accepted, be credited less the cost of handling and the freight and carriage expenses incurred.

9—All orders submitted to us through our division sales offices, sales agents, or direct to the general office by the buyer, must be subject to the approval of the Vice President, Treasurer, or General Sales Manager of the Pacific States Cast Iron Pipe Company at Provo, Utah, for final acceptance.

10—Unless assented to by the proper official of our company, in writing, no terms or conditions at variance with, or in addition to those indicated herein shall apply to any transaction resulting from this quotation.

PACIFIC STATES CAST IRON PIPE CO.

W. W. Clyde

Tallied by

Uinta Trail

66- 6" 18' @ SA 32. Taylor Gulch EL

1	438	473	
2	473	+69	
3	+45	+72	
4	+45	461	
5	+66	462	
6	+64	+59	
7	468	+54	
8	+62	+58	
9	+66	477	
10	470	+53	
11	+73	+74	
12	+57	+80	
13	+72	477	
14	+82	+78	
15	+82	+72	
16	+66	+75	
17	463		
18	+66		
19	470	30.678	
20	[illegible]	23.16	
21	458		
22	436		
23	+66		
24	+67		
25	454		
26	+67		
27	+66		
28	463		
29	+63		
30	461		
31	465		
32	456		
33	+62		
34	+68		
35	+64		
36	+62		
37	[illegible]		
38	[illegible]		
39	+68		
40	+469		
41	+62		
42	+70		
43	463		
44	460		
45	421		

4.74
4.80
4.77
4.78
4.72
4.75

30 @ 78 *

1	+73	+69
2	+72	+72
3	+72	+66
4	+66	+62
5	+64	+59
6	+68	+64
7	+62	+52
8	+66	+77
9	+76	+73
10	+73	+74
11	+77	+80
12	+72	+77
13	+82	+78
14	+82	+72
15	+66	+75
16	+68	
17	+66	
18	+70	30.678
19	+73	2.308
20	+58	33.116
21	+76	
22	+66	
23	+67	
24	+64	
25	+67	
26	+60	
27	+63	
28	+63	
29	+61	
30	+65	
31	+76	
32	+62	
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34	+64	
35	+62	
36	+62	
37	+73	
38	+68	
39	+66	
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45	+70	
46	+64	
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49	+71	
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4.74
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4 X 4
2 X 6

FILED
JUN 13 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 178

STATE TAX COMMISSION OF UTAH, *Petitioner*,

vs.

PACIFIC STATES CAST IRON PIPE CO., a corporation, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

A. PRATT KESLER
Attorney General for Utah

F. BURTON HOWARD
Assistant Attorney General for Utah
State Capitol
Salt Lake City, Utah
Attorneys for Petitioner

INDEX

	Page
Citations to opinions below	1
Jurisdiction	2
Question presented	2
Constitution and statutes involved	2
Statement of the case	3
Reasons for granting the writ	5
Conclusion	9
Appendix — Opinions and judgment below:	10
I. Decision of the State Tax Commission of Utah	10
II. Opinion of the Supreme Court of Utah	15
III. Judgment of the Supreme Court of Utah	26

CITATIONS

CASES:

Central Transportation Co. v. Atkins, 202 Tenn. 512, 305 S.W. 2d 940, cert. denied 355 U.S. 913	6
Denver & R.G.W. Ry. Co. v. State Tax Commission, 11 Utah 2d 301, 358 P.2d 352, cert. denied 368 U.S. 830	6
Dept. of Treasury of Indiana v. Wood Preserving Corp., 313 U.S. 62	6, 8
Eastern Air Transport v. South Carolina Tax Commission, 285 U.S. 147	6
International Harvester Co. v. Treasury, 322 U.S. 340	6, 8
Superior Oil Co. v. Mississippi, 280 U.S. 390	6

CONSTITUTION:

Federal Constitution, Art. I, Sec. 8	2

STATUTES:

Utah Code Annotated, 1953, as amended	
Section 54-6-9	4
Section 59-15-2(b)	8
Section 59-15-4	2, 5

In the Supreme Court of the United States

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STATE TAX COMMISSION OF UTAH, *Petitioner*,

vs.

PACIFIC STATES CAST IRON PIPE CO., a corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

The State Tax Commission of Utah prays that a writ of certiorari issue to review the judgment of the Supreme Court of Utah entered in the above entitled case February 20, 1962.

CITATIONS TO OPINIONS BELOW

The decision of the State Tax Commission of Utah (R. 0094) is unreported and is printed in the appendix hereto, *infra*, p. 10. The opinion of the Supreme Court of Utah (R. 0110) is reported in ..... Utah ....., 369 P.2d 123 (1962), and is printed in the appendix hereto, *infra* p. 15.

JURISDICTION

The judgment of the Supreme Court of Utah was entered on February 20, 1962 (R. 0113); *infra*, p. 26. A timely petition for rehearing was filed March 12, 1962 (R. 0014). The petition was denied on March 26, 1962, (R. 0116). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), in that the validity of a state statute is drawn into question on the grounds of its being repugnant to federal law.

QUESTION PRESENTED

Whether a tax required under state law to be imposed on every consummated transaction of sale constitutes a violation of interstate commerce when imposed upon goods sold and delivered in Utah to a purchaser, and thereafter transported by said purchaser, pursuant to an agreement with the seller, to an out-of-state destination.

CONSTITUTION AND STATUTES INVOLVED

The case directly involves the following:

Article I, Section 8, of the Constitution of the United States, which reads in part:

> "The Congress shall have Power . . . (t)o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . ."

Utah Code Annotated, 1953, pertinent sections of which provide:

> Section 59-15-4. EXCISE TAX—RATE. "From and after the effective date of this act there is levied and there shall be collected and paid:
>
> (a) A tax upon every retail sale of tangible personal property made within the state of Utah equivalent to 2 per cent of the purchase price paid or charged. . ."

STATEMENT OF THE CASE

This case is an original proceeding in the Supreme Court of the State of Utah to review an order and decision of the State Tax Commission of Utah (referred to herein as the "Tax Commission"). The Tax Commission imposed sales tax liability upon the respondent, Pacific States Cast Iron Pipe Company (referred to herein as the "Pipe Company"), for sales made by it of cast iron pipe and related commodities to contractors within the State of Utah, which materials were subsequently transported outside the state in interstate commerce. The Utah Supreme Court reversed the Tax Commission's decision (R. 0113). The Tax Commission, as petitioner, now seeks review of that Court's decision.

The facts are not in dispute. They are substantially as found by the Utah Supreme Court in its opinion herein (R. 0110). Essentially, they show that respondent is a Nevada Corporation duly qualified to do business in Utah and is engaged in the manufacture and sale of cast iron pipe and related items. All of the sales, which are the subject matter of the Tax Commission's proposed deficiency, were solicited by means of quotations issued by the Pipe Co. to contractors bidding on various out-of-Utah jobs, and the materials sold under such quotations were purchased for use on specific out-of-state jobs and were of specified sizes and lengths to conform to the specifications covering the particular job involved (R. 0013).

The Tax Commission made subject to its deficiency assessment only those sales of cast iron pipe and related commodities purchased in the State of Utah wherein the contractor, or its agent, as purchaser, received delivery of the material purchased from the Pipe Company in the contractor's own trucks at respondent's plant in Ironton, Utah. In all instances herein, the purchaser thereafter

transported the materials out of the State of Utah in its own trucks.

It is conceded that the original quotations contemplated delivery of goods sold out of the State of Utah. However, the parties, by their subsequent correspondence, modified the original requirement of out-of-state delivery and agreed that delivery should be made to the buyer at the seller's foundry, f.o.b. Ironton, Utah (Exhibits 4(e), 5(e), 6(e), and 7 (e)). The invoices and bills of lading which represent these transactions further indicate that title passed within the State of Utah when the goods were delivered to the buyer at the place agreed upon (Exhibits 4(d), 5(d), 6(d), and 7(d), Contract Terms and Conditions, Secs. 1 (a)). Both vendor and vendee considered the cast iron pipe sold to be the exclusive property of the vendee at the time it took possession of the materials in its own vehicles at the foundry. The sellers were under no contractual obligation of any kind to deliver these materials across state lines (See Terms and Conditions set forth in Par. 4 on the reverse side of each of Exhibits 4(e), 5(e), 6(e) and 7(e)). The record shows that the contractors considered themselves to be carrying their own merchandise, and, as a consequence, did not obtain a certificate of convenience and necessity from the Utah Public Service Commission, required of all interstate contract motor carriers transporting property for hire (R. 0064; 0088-0089) (U.C.A., Sec. 54-6-9).

Based upon the stated facts in the record, the Tax Commission concluded that the respondent, under the laws of Utah, was responsible for the collection and payment of sales tax on all items sold by it and delivered to contractors within the State of Utah. It further concluded that title to all materials purchased from the Pipe Company and delivered to contractors within the State of Utah passed in the State of Utah and that the sales transactions which

constituted the subject matter of the deficiency assessment were not sales in interstate commerce. The deficiency against the respondent for the period January 1, 1957 to December 31, 1959 was sustained in the amount of $32,290.18 plus interest at the rate of 6 per cent per annum from January 1, 1957 until paid (R. 0094-0097).

A petition for writ of certiorari was timely filed with the Supreme Court of Utah (R. 0098), and in said petition the Pipe Company raised the federal questions, here sought to be reviewed, by asserting in said petition that the imposition of the tax was a burden upon interstate commerce, prohibited by the commerce clause of the United States Constitution (R. 0100). The Supreme Court of Utah reversed the decision of the Tax Commission and stated in its opinion the constitutional grounds which the Pipe Company had asserted, namely, that the state statute as applied under the facts of this case constitutes a burden on interstate commerce under Article I, Section 8, of the United States Constitution (R. 0111).

REASONS FOR GRANTING OF THE WRIT

1. The decision of the Utah Supreme Court is believed to be erroneous and in conflict with prior decisions of this Court. The tax in question is "(a) tax upon every retail sale of tangible personal property made within the State of Utah equivalent to 2 per cent of the purchase price paid or charged . . ." Section 59-15-4, U.C.A. 1953. The holding of the Utah Supreme Court is to the effect that passage of title and delivery of materials sold within the State of Utah is not subject to this sales tax if both seller and buyer agree that the products sold are to be shipped to an out-of-state destination in the buyer's own trucks. In other words, that a sale consummated within the state of

Utah is not taxable if use of the goods so purchased is contractually contemplated outside of the state of purchase.

As such, there is a direct conflict between this decision of the Utah Supreme Court and other decisions of this Court. The Utah Court has decided a federal question of substance in a way not in accord with applicable decisions heretofore rendered by this Court. The situation herein may be characterized as one wherein the passage of title, delivery or transfer of possession, took place within the State of Utah, but the goods so sold were thereafter transported out of state for use and consumption. This Court, in at least four other cases, has considered a similar factual situation, each time upholding a non-discriminatory sales tax or gross receipts tax on facts similar to these. These cases are: *Superior Oil Co. v. Mississippi*, 280 U.S. 390; *Dept. of Treasury of Indiana v. Wood Preserving Corp.*, 313 U.S. 62; *Eastern Air Transport v. South Carolina Tax Commission*, 285 U.S. 147; and *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340. In addition, the following cases involving similar situations have been decided in state courts in favor of the imposition of tax, and appeals by the losing parties have been carried to this Court, which denied certiorari to review the same. These cases are: *Denver & R.G.W. Ry. Co. v. State Tax Commission*, 11 Utah 2d 301, 358 P.2d 352, cert. denied 368 U.S. 830, and *Central Transportation Co. v. Atkins*, 202 Tenn. 512, 305 S.W.2d 940, cert. denied 355 U.S. 913.

The most recent Supreme Court case to consider the problem was *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340. In that case several categories of sales were subjected to tax by the Indiana Department of Treasury, only one of which is pertinent here; that is, the "Class D" sales or sales by Indiana sellers of Indiana goods to

out-of-state buyers who came into Indiana, took delivery there and then transported the goods out of the state immediately upon delivery. This Court said in that case, in sustaining the tax:

> ". . . a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce." 322 U.S., at 346.

And concluded:

> "We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such 'local activities or privileges' . . . are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage." 322 U.S. at 349.

In the transactions herein, the actual contracts and transactions of sale upon which the Tax Commission levied its sales tax deficiency were consummated within the State of Utah. They became closed transactions of sale within the borders of that state. The evidence supports this conclusion. Passage of title and delivery of possession to the ultimate consumer-purchaser all took place within the State of Utah. Petitioner agrees that an out-of-state use was contemplated by the parties in most instances but contends that the buyer, having taken title and possession within the state, was by no means obligated to deliver the materials out of the state to himself; and, that even if such obligation can be found, it does not convert the closed transaction of sale into a sale in interstate commerce.

There can be no discrimination against interstate commerce by the Utah sales tax application, because under

Utah law, Section 59-15-2(b), U.C.A. 1953, the Utah tax only applies to closed transactions of sale. If a contract itself requires for its consummation the delivery across state lines, petitioner concedes that it cannot tax such a sale, for without delivery in Utah, a sale never becomes a closed transaction within the state. However, the transactions subjected to the tax herein do not fall within that category.

Even if the Pipe Company were bound by contract to deliver merchandise sold across state lines, petitioner submits that this is not controlling in view of the decision of this Court in *Dept. of Treasury of Indiana v. Wood Preserving Corp.*, 313 U.S. 62. In that case this Court ruled, where a sales contract calling for treatment of ties in Ohio nevertheless gave prior delivery to the taxpayer in Indiana, that out-of-state consignment was "not of consequence in light of the facts showing completed delivery to the Railroad Company in Indiana." The tax, therefore, was sustained.

2. Clearly, the question presented is of importance to all states' taxing authorities. If the decision of the Utah Court is allowed to stand, it will discredit the cited authorities, particularly *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340. Utah and other states will be faced with the difficult burden of extracting proof and evaluating claims that a purchaser intends to use the property purchased somewhere outside of the state, or that he is obliged to do so. In most cases, it will not be too difficult to show to the seller's satisfaction that such out-of-state use is intended or required. We cannot conceive that a state's right to tax should properly depend upon such considerations. The doubts raised in this state will likely be raised in other states which have similar sales tax statutes and, indeed, may result in a renewal of litigation by all parties who have assumed that the *International Harvester* case, *supra*, was controlling upon similar factual situations.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

A. PRATT KESLER
Attorney General for Utah

F. BURTON HOWARD
Assistant Attorney General for Utah
State Capitol
Salt Lake City, Utah
Attorneys for Petitioner

APPENDIX

OPINIONS AND JUDGMENT BELOW

I. Decision of the State Tax Commission of Utah

BEFORE THE STATE TAX COMMISSION OF UTAH

In the Matter of the Sales and Use Tax Liability of
PACIFIC STATES CAST IRON PIPE COMPANY

DECISION

The above entitled matter came on regularly for a hearing before a lawfully constituted quorum of the State Tax Commission of the State of Utah on the 4th day of January, 1961, upon petition and notice as required by law; and the petitioner, Pacific States Cast Iron Pipe Company, appearing by and through its counsel of record, C. Matthew Gilmour; and the State Tax Commission appearing by and through its counsel, F. Burton Howard; both parties having presented sworn testimony and documentary evidence in support of their respective positions, and the State Tax Commission having heard and reviewed the evidence herein and being fully advised in the law and the premises, hereby makes the following

FINDINGS OF FACT

1. That the petitioner, Pacific States Cast Iron Pipe Company is a Utah corporation qualified pursuant to Utah statutes to do business in the state of Utah and is engaged in the manufacture and sale of cast iron pipe and related items.

2. That on April 12, 1960 the State Tax Commission of Utah, through its Sales and Use Tax Auditing Division, proposed a sales tax deficiency against the petitioner in the amount of $34,192.62, together with interest to April 25, 1960, in the amount of $2,964.43, for a total sales tax deficiency of $37,157.05 as of the date of the deficiency.

3. That on April 12, 1960, the State Tax Commission of Utah, through its Sales and Use Tax Auditing Division, proposed a use tax deficiency against petitioner in the amount of $2,041.39, together with interest to April 25, 1960, in the amount of $112.93 for a total use tax deficiency in the amount of $2,154.32 as of the date of the deficiency.

4. That the sales tax deficiency was for the period of three years, January 1, 1957 to December 31, 1959; and the use tax deficiency was for the period January 1, 1956 to December 31, 1959.

5. That the above mentioned use tax deficiency has since been paid.

6. That on April 20, 1960 the petitioner, Pacific States Cast Iron Pipe Company, duly filed with the Tax Commission its protest and request for hearing before the Tax Commission.

7. That as a result of informal hearings held May 25, 1960 and October 27, 1960, certain items were eliminated from the original sales tax deficiency so that the only transactions now subject to this deficiency are those sales of cast iron pipe and related commodities purchased in the State of Utah where, in all of the instances here involved, the contractor or his agent, as purchaser, received delivery of the materials purchased from petitioner in the contractor's own trucks at petitioner's plant at Provo, Utah.

8. That the sales in question in most cases were negotiated by representatives of the petitioner outside of the State of Utah.

9. That the materials so purchased were purchased for use on specific out-of-state jobs and were of specific sizes and lengths to conform to the specifications covering the particular out-of-state jobs.

10. That Sales Tax Regulation No. 44 as promulgated by the State Tax Commission provides:

> "Sales made in interstate commerce are not subject to the sales tax imposed by the act. However, the mere fact that commodities purchased in Utah are transported beyond its boundaries is not enough to constitute the transaction of sale in interstate commerce. Where the commodity is delivered to the buyer in this state even though the buyer is not a resident of the state and intends to transport the property to a point outside the state, the sale is not in interstate commerce and is subject to tax.
>
> In determining whether a sale is made in interstate commerce certain general principles will apply. Interstate commerce is not recognized unless there is a movement of a subject commerce from a point within the territorial jurisdiction of one state across the boundary line to a point within the territorial jurisdiction of another. Each of the following three rules must be complied with to constitute interstate commerce:
>
> 1. The transaction must involve actual and physical movement of the property sold across the state line.
>
> 2. Such movement must be an essential and not an incidental part of the sale.
>
> 3. The seller must be obligated by the express or unavoidable implied terms of the sale or contract to sell

to make physical delivery of the property which forms the subject matter of the transaction across a state boundary line to the buyer.

When tangible personal property is located within the state of Utah at the time of sale and is delivered within the state of Utah such sale is taxable irrespective of where the parties to the contract of sale are located and where the contract was made or accepted or the funds paid. Where tangible personal property is located within the state of Utah at the time of sale, but delivery of the article sold is made at a destination outside Utah and where the seller of the article retains actual physical possession of the article after sale either in person or through an agent until such property is delivered to the purchaser at a destination beyond the boundary of this state, such sale shall be deemed to have been made in interstate commerce and exempt from Utah tax.

Where delivery is made by the seller to a common carrier for transportation to the buyer outside the state of Utah, the common carrier shall be deemed to be the agent of the vendor for the purpose of this section regardless of who is responsible for the payment of the freight charges.

If property is ordered for delivery in Utah from a person or corporation doing business in Utah the sale is taxable even though the merchandise may be shipped from outside the state to the seller or direct to the buyer."

11. That petitioner, as a seller, was not obligated, by the express or implied terms of the contracts herein involved, to make delivery across the state boundary line to the buyer.

From the foregoing findings of fact, the Commission makes the following

CONCLUSIONS OF LAW

1. That the petitioner, under the laws of Utah, is responsible for the collection and payment of sales tax on all items sold by it and delivered to contractors within the state.

2. That the sales transactions which constitute the subject matter of the deficiency assessment are not sales in interstate commerce.

3. That title to all materials purchased from petitioner and delivered to contractors within the State of Utah passed in the State of Utah.

4. That the deficiency against the Pacific States Cast Iron Pipe Company for the period January 1, 1957 to December 31, 1959, together with interest on the principal at the rate of 6 per cent per annum from January 1, 1957 until paid, should be sustained, in the amount of $32,290.18 plus interest.

WHEREFORE, it is ORDERED, ADJUDGED and DECREED that the sales tax deficiency assessed against the petitioner be and the same is hereby sustained for the taxable period.

Dated this 23rd day of May, 1961.

BY ORDER OF THE STATE TAX COMMISSION

II. Opinion of the Supreme Court of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 9493

PACIFIC STATES CAST IRON PIPE COMPANY, *Plaintiff*

v.

STATE TAX COMMISSION OF UTAH, *Defendant*.

HENRIOD, Justice:

Review of a tax assessment levied for alleged sales tax liability incident to the sale of pipe to a nonresident purchaser taking delivery, not by common carrier, but in his own equipment at the pipe company's foundry in Utah, delivering it himself to an out-of-state destination designated in the contract. Reversed.

The question: whether, *under the facts of this case*, delivery in Utah to the purchaser, coupled with actual transportation by him to an out-of-state destination transmutes an erstwhile interstate shipment, whose taxability by Utah concededly would be invalid, as being a burden on interstate commerce under the commerce clause,[1] into a taxable intrastate transaction not burdensome to interstate commerce.

It is conceded that had the pipe been delivered to a common carrier consigned to an out-of-state purchaser, the sale would not have been taxable in Utah. Also, that delivery was taken in Utah by the out-of-state purchaser

1. Art. 1, Sec. 8, U.S. Constitution, having to do with federal power "to regulate Commerce . . . among the several states. . . ."

in his own equipment, actually transported from the pipe company's foundry directly, and without interruption, to the out-of-state destination called for by the contract and bill of lading.

It seems to be undisputed also that: The pipe company makes and sells pipe in 11 western states. Delivery mostly is in interstate commerce by common carrier or in the company's own equipment. As has been said, the out-of-state purchaser took delivery here in his own equipment. The contract called for out-of-state shipment, and the pipe company set the destination price which included the going common carrier freight charge between the two points. In this case such tariff was credited to the purchaser. The bill of lading and contract of sale clearly demonstrated an understanding by both seller and buyer that the pipe was to be shipped to an out-of-state destination, to be used on a municipal project, under engineered specifications, federally okayable because of federal fiscal participation. Under such contract, bills of lading and the highly detailed specifications, it was quite improbable, if not almost impossible, to conclude other than that the goods could not be diverted to any other or intrastate consumption. Also, it appears inescapable to conclude from the record in this case, other than that there was no effort or intent to circumvent any tax laws in virtue of the use of any contractual or transportational format designed to deceive. All of the evidence adduced points up a certainty of interstate shipment that would overide any suggestion that the products were to be consumed or stored in Utah. The contract clearly evinced a contemplated interstate shipment. The contention of the Tax Commission that the documnts of sale and transportation were an evasive gesture to avoid taxation, and that the goods *could have been diverted to a local use*, simply is not sustained by the facts since the goods actually

reached their consigned destination. Nor would the cases seem to sustain such a contention.[2] Had they *in fact* been so diverted the most that could be said is that there would have been a contractual breach respondable in damages, and perhaps reflecting a circumstance justifying the imposition of a Utah sales tax on an interstate transaction.

The Tax Commission demurs to the pipe company's contention that the facts of this case unerringly point up an unburdenable interstate shipment, commerce clausewise. It points to several facts which it claims are conclusive of the intrastateness of this sale: 1) that delivery was taken here,[3] that title passed here,[4] and that the risk of loss shifted here. It urges that delivery etc. constituted a "taxable

2. United Fuel v. Hallanan, 257 U.S. 277, 42 S. Ct. 105, 66 L.Ed. 234 (1921): "The typical and actual course of events marks the carriage of the greater part as commerce among the States and theoretical possibilities may be left out of account." Hughes Bros. v. Minnesota, 272 U.S. 469, 47 S. Ct. 170, 71 L. Ed. 359 (1926): "The mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation. . . ."

3. The Richfield Oil case, post, negatives this concept.

4. In re Globe Varnish Co., 114 F.2d 916 (1940): ". . . we think it makes no difference when the title passed, and we are unable to perceive how that fact, whenever it occurred, could be determinative of the character of the sale, as to whether it was an interstate or intrastate transaction." The Pipe Line Cases, 234 U.S. 548, 34 S. Ct. 956, 58 L.Ed. 1459 (1914): ". . . the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce." Hughes Bros. v. Minnesota, 272 U.S. 469, 47 S. Ct. 170, 71 L. Ed. 359 (1926): "We do not think it important, for purposes of this case, to decide where title to the timber was at the time the drive began." Spalding v. Edwards, 262 U.S. 66, 43 S. Ct. 485, 67 L. Ed. 865 (1923): "Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use." Also: Dahnke-Walker v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L. Ed 239 (1921).

event" invulnerable to any claimed offense against the commerce clause. Ordinarily it would be right.[5] But delivery here, as a technical matter, cannot transcend the interdictions of the commerce clause, if, piercing the veil of technicality, based on the particular facts here, substance reflects a situation offensive to the commerce clause. We think this case, in substance, pierces that veil.[6]

The Commission relies heavily on International Harvester v. Dept. of Treasury[7] to support its contention. That case, on stipulated facts, simply generalizes that "Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state" would be taxable because of a local taxable event. If that were all we had in the instant case, our decision would be an antithesis, since, to reduce the above commentary to its own words, it simply implies, for example, that if a Utahn visits New York, and buys wearing apparel with the intent of wearing it en route back to and in Utah thereafter, the sale is taxable in New York, inoffensive to the inhibitions of the commerce clause. No corrollary, no analogy applies here. The New York seller is unconcerned as to whether the vestment be worn out in Utah or elsewhere. But if the contract were to ship 1,000 suits of clothes to a retailer in Utah without anything else, the import of such a contractual arrangement would reflect an interstate shipment that if taxed by New York, would do injustice to the traditional and his-

5. McGoldrick v. Berwind-White, 309 U.S. 33, 60 S. Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876 (1940). International Harvester v. Dept. of Treasury, 322 U.S. 340, 64 S. Ct. 1019, 88 L.Ed. 1313 (1944).

6. ". . . substance and not form controls in determining whether a particular transaction is one of interstate commerce . . ." Heyman v. Hays, 236 U.S. 178, 35 S. Ct. 403, 59 L.Ed. 527 (1915).

7. Supra, note 5.

toric concepts anent interstate commerce and its inviolability by local tax burdens. The International Harvester case, its forebears and successors, have provided fuel for a judicial fire over the years with respect to close factual situations, but the instant case in substance lends itself to no factual obscurity or uncertainty of contemplated result, such as to be dominated by that case and any others cited that might confuse, but do not decide the case here. We have that confusion to those who have discussed it, and to their observation appurtenant thereto, a couple of which we refer to the reader for a review of the cases covering this whole field which are discussed better there than space justifies here. If the International Harvester case created any dubitability as to application in the case here, it was laid at rest by its author, who later fathered Richfield Oil v. State Board[9], involving an attempted sales tax imposition on a transaction where oil was delivered to a foreign purchaser's equipment in a local harbor, wherein Mr. Justice Douglas had this to say:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. *But the same degree of certainty may exist though no common carrier is involved.* The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. . . . That delivery marked the commencement of the movement of the oil abroad. It is true . . . that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold

8. New Light on Gross Receipts Taxes, 53 Harvard Law Review; Sales Taxation of Interstate Commerce, Univ. of Detroit Law Journal, Vol. 18, p. 416.

9. 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946).

> of the vessel, it passed into the control of a foreign purchaser *and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to a domestic use.* It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. *The means of shipment are unimportant so long as the certainty of the foreign destination is plain.*"

We think our case is bottomed on facts so certainly pointing up an interstate shipment free from local tax burdens, as to transcend, even, the facts and conclusions reached in the Richfield Oil case. It is the substance of it that counts, — not technicalities of delivery, title or assumption of risk, else the commerce clause would suffer senility and impotence.[10]

Both sides have pointed to our statute[11] and Tax Commission Regulations[12] which purport taxwise to include or exclude a particular transaction. The Regulations, no matter how definitive of what a taxable event is, cannot obfuscate the true purpose and intent of the commerce clause. That clause contemplates facts and substance, and not definitions amounting to legal conclusions. We say this; conceding our disposition to sustain administrative agencies enjoying a greater degree of expertness in their field than do we. But we cannot interpret a conceded factual situation pointing to an interstate shipment, to result in victimization by a regulatory definitional legal conclusion, urged as being controlling over facts defying it. (Emphasis supplied.)

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10. ". . . substance and not form controls in determining whether a particular transaction is one of interstate commerce and hence the mere method of delivery is a negligible circumstance if in substantial effect the transaction *under the facts of a given case* is interstate commerce." Heyman v. Hays, supra.

11. Title 59-15-2, Utah Code Annotated 1953, and subdivisions.

12. Regulations 31 and 44, Utah Sales Tax Regulations.

WE CONCUR:

LESTER A. WADE, *Chief Justice*

E. R. CALLISTER, JR., *Justice*

CROCKETT, Justice: (Dissenting)

I dissent. It has long been held by the Supreme Court of the United States that a state may tax sales made within its borders even though it is the intent of the buyer to remove the items to another state prior to using them.[1] This rule was clearly set forth by Justice Douglas in International Harvester v. Department of Treasury:[2] ". . . a local transaction (sale) is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce," and concluded that "those in interstate trade could not complain if interstate commerce carried its share of the burdens of local government which helped sustain it."

I see no reason why the facts of the instant case require a result different from that in International Harvester. In that case the court held taxable "Sales by branches (Pacific States Pipe Co.) located in Indiana (Utah) to dealers and users residing outside of Indiana (Utah), in which the customers came to Indiana and accepted delivery to themselves in this state." The only fact not identical in the case now before us is that some of the buyers were also Utah companies who accepted delivery in Utah but intended to ship or transport the pipe to other states for use there. I submit that this change in the facts, if anything, makes the sales even more clearly taxable by Utah than those in the Harvester case.

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1. See Department of Treasury v. Wood Preserving Corp., 313 U.S. 62; McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 331.

2. 322 U.S. 340.

The majority opinion seeks to avoid the long-standing rule of the Harvester case by relying on the case of Richfield Oil v. State Board.[3] But the cases are completely different. The Richfield case, decided three years after the Harvester case, involved the sale for *export* of oil to the government of New Zealand, which was delivered to the purchasers' ships in a California port. The U.S. Supreme Court struck down the attempted taxation of the sale by California on the basis of the export clause of the U.S. Constitution, which provides simply that: "No state shall . . . lay any Impost or Duty on Imports or Exports."[4] In doing so, Justice Douglas, who had authored the opinion in the Harvester case, made it clear that the decision did not run contrary to the law announced in the Harvester case. The latter was governed by the commerce clause of the U.S. Constitution. Its language is general, granting to Congress the power to "regulate commerce . . . among the several states."[5] As stated above, the Supreme Court has interpreted this to mean that while interstate commerce may be required by the states to pay its own way, no state may encroach upon the power of Congress to regulate it by placing an undue burden on the interstate flow of goods. Whereas, in the Rockfield case, the court was not concerned with the reasonableness of a burden, but only with the simple and direct prohibition against imposing a tax on exports.

Justice Douglas pointed out that the two constitutional provisions, while related, are not exactly the same. He elaborated on the reasons for the different rules thus:

". . . the law under the Commerce Clause has been fashioned by the Court in an effort to reconcile

3. 329 U.S. 69.

4. Art. I, Sec. 10, Constitution of the United States.

5. Art. I, Sec. 8, Constitution of the United States.

> competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits . . . and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it. . . .
>
> It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress."

He further pointed out that this distinction accounted for the different result upholding the Mississippi sales tax in Superior Oil Co. v. Mississippi[6] where the facts were almost identical with those in the Richfield case except that the oil was being transported to Louisiana for resale by the purchaser rather than to a foreign country.

The facts of our case clearly show sales made in Utah which have been held unequivocally by the U.S. Supreme Court to be a "taxable event"; and that a tax levied on such sales by a state does not run afoul of the commerce power of the Federal Government. I am not aware that there has been any great reluctance on the part of the appropriate agencies of the Federal Government to exercise their authority or to assume the full measure of their responsibility. No reason is suggested, and I think none exists, why this court should be over-solicitous in extending federal controls over business transactions within this state.

To rule that where a sale is made in Utah it is not subject to a sales tax merely because the item purchased is to

6. 280 U.S. 390.

be taken to another state, would open an avenue to easy avoidance of the tax by the customer simply declaring his intention to take the purchase elsewhere; would provide a basis for charging tax to some customers and not others; would give rise to untold mischief in administration and to extensive loss to the state of revenue to which it is entitled.

The difficulties just pointed out and the unreasonableness and impracticality of the majority's conclusion is further emphasized by the fact that adjoining states have a use tax law, similar to our own, which provides that property brought into the state is subject to a use tax, equivalent to the sales tax, but exempts the property from the use tax if a sales tax is paid.[7] Thus under the majority decision, Utah would lose the sales tax on these transactions made within our state to which the state is entitled, and the equivalent tax would be collected by a foreign state. On the other hand, foreign states in all likelihood would collect sales taxes on a similar sales, and when such purchases were brought into Utah, our sales tax could not be collected.[8]

The foregoing emphasizes the propriety and the desirability of adhering strictly to the provisions of our statutes which levy sales tax on "every retail sale of tangible personal propery made within the state of Utah."[9] But they exempt "sales whicl the state of Utah is prohibited from taxing under the Constitution or laws of the United States."[10] It could not be plainer that the legislature intended to tax all sales made within the state insofar as it has authority to do so. It is for the legislature to determine how the taxing power of the state should be used, and it is

7. For discussion of this proposition see Butler v. Tax Comm., Utah ....., 367 P2d 852.

8. Ibid.

9. Sec. 59-15-4, U.C.A. 1953.

10. Sec. 59-5-6, U.C.A. 1953.

not the function of this court to examine the policy behind the tax. It is hardly necessary to point out that the residium of power rests with the states and is limited only by those expressly granted by the Federal Constitution to the Federal Government.[1] The United States Supreme Court is the final authority in interpreting that document. When it has spoken and laid down a clear rule regarding the commerce clause which governs the issue here presented, it is not our prerogative, nor should it be our desire to redefine those limits ascribing additional controls over activities within our state.

The Tax Commission, upon competent evidence, expressly found that the transactions in question were sales made within the State of Utah. That finding is unassailable and the tax is payable. The decision should be affirmed. McDONOUGH, J. concurs in the views expressed in the opinion of Mr. Justice Crockett.

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11. Amendment 10, Constitution of the United States.

III. Judgment of the Supreme Court of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

Regular October Term, 1961

February 20, 1962

No. 9493

PACIFIC STATES CAST IRON PIPE COMPANY, *Plaintiff*,

v.

STATE TAX COMMISSION, *Defendant*.

Judgment

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged, and decreed that the order of the State Tax Commission be, and the same is, reversed.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. [redacted] 178

State Tax Commission of Utah, Petitioner,

vs,

Pacific States Cast Iron Pipe Co., a corporation,
Respondent.

Respondent's Brief In Opposition To Petition For A Writ of Certiorari

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INDEX

	Page
Jurisdiction	2
Question Presented	2
Scope and Grounds of the Decision Below	2
Statement of the Case	3

Argument:

1. The writ should not be granted because the decision of the Utah Supreme Court is in complete accord with prior decision of this Court. 8
2. The writ should not be granted because the question involved is of no substantial importance to anyone, except this respondent. 14
3. The writ should not be granted because the decision may rest on an adequate state ground. 15

CITATIONS

Cases:

Adams Manufacturing Co. v. Storen, 304 U.S. 307 (1938)	9
Banker Brothers v. Pennsylvania, 222 U.S. 210 (1911)	9
Brooks Transp. Co., Inc. v. United States, 93 Fed. Sup. 517 (1950) (E. D. Va.) Aff. 340 U.S. 925 (also affirming Lenoir Chair Co. Cont. Car. App., 51 MCC 65)	14
Dept. of Treasury of Indiana v. Wood Preserving Corp., 313 U.S. 62 (1941)	10
Edelman v. Boeing Air Transport, 289 U.S. 249 (1933)	9
Freeman v. Hewit, 329 U.S. 294 (1946)	9
Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932)	9
Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939)	9
Henneford v. Silas Mason Co., 300 U.S. 577 (1937)	9
International Harvester Co. v. Dept. of Treasury, 322 U.S. 340 (1944)	10

	Page
McGoldrick v. Berwind-White Co., 304 U.S. 33 (1940)	9
Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934)	9
Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946)	10
Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923)	9
Superior Oil Co. v. Mississippi, 280 U.S. 390 (1930)	10
Williams Bros. Corp. Cont. Car. App., 44 Motor Carrier Cases (ICC) 557 (Div. 5) (1945)	14
Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935)	9

Constitution:

Federal Constitution, Art. I, Sec. 8	2
Section I, Fourteenth Amendment	2

Statutes and Regulations:

28 U.S.C. Sec. 1257 (3)	2
Sec. 59-15-6, U.C.A. 1953	15
Sales Tax Regulation No. 44	2, 16

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 1038

State Tax Commission of Utah, Petitioner,

vs.

Pacific States Cast Iron Pipe Co., a corporation,
Respondent.

Respondent's Brief In Opposition To Petition For A Writ Of Certiorari

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This brief is respectfully submitted by respondent in opposition to the petition for a writ of certiorari filed by the State Tax Commission of Utah to review a judgment of the Supreme Court of Utah entered February 20, 1962, invalidating an assessment of sales tax on the gross receipts of certain interstate sales and shipments of cast iron pipe to

out-of-state sewage and water works job sites where, in lieu of shipment by common carrier, respondent employed and paid the buyer to haul the pipe to the out-of-state job site destination.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provision of 28 U.S.C. [illegible]c. 1257 (3), "in that the validity of a state statute is drawn into question on the grounds of its being repugnant to federal law."

QUESTION PRESENTED

Contrary to petitioner's statement, the question presented here is whether Utah, the state of the seller, can impose a sales tax on the proceeds of interstate sales (the bulk of which have already been subjected to sales or use tax by the state of the buyer) under the commerce clause of the Federal Constitution (Art. I, Sec. 8) and under the definition of interstate commerce contained in Utah Sales Tax Regulation No. 44 (set forth on pages 12-13 of the petition).

Also involved and raised below were the questions whether such a tax denies to respondent the equal protection of the laws and deprives respondent of property without due process of law, all in violation of Section I of the Fourteenth Amendment of the Federal Constitution.

Scope and Grounds of the Decision Below

The opinion of the Supreme Court of Utah appears to place its decision on the Federal ground that the tax is

in violation of the commerce clause of the Federal Constitution.

It may be suggested, however, that the decision may be in part grounded on the Utah State interstate commerce definitional Regulations, interpreted in the light of the decisions of this Court relating to interstate commerce. Or, put another way, it may be suggested that the Utah Court with "a conceded factual situation pointing to an interstate shipment" before it, refused to construe the Utah regulatory definitions to permit a tax which the decisions of this Court clearly, and would otherwise, invalidate.

Statement of the Case

In its argument below and again here in its petition for certiorari, the Tax Commission persists in its attempt to convert the special facts of this case into the ordinary case of a fully consummated local sale where the purchaser, resident or non-resident, then or thereafter, with or without the knowledge of the seller, merely *intends* to take the property to some other state. For this reason, it is necessary to make some revision of petitioner's statement of the case so that the facts will more nearly conform to those set forth in the opinion of the Supreme Court of Utah.

Respondent manufacturers cast iron pipe at its plant in Provo, Utah, which is sold throughout the western states. All pipe is sold on the basis of delivered prices, including freight, to the specific job site where the pipe is to be buried in the ground for use in sewage or waterworks systems. The pipe is sold mainly to governmental units or agencies in accordance with detailed engineering plans and specifica-

tions and on the basis of sealed bids generally submitted after public advertisement.

Respondent maintains various sales offices and agencies in the Western states. When a job is advertised or let for bid, the sales agents secure from the engineer in charge the name of all contractors bidding on the job and make up a detailed list of all pipe and related material set forth in the plans and specifications required in performance of the job.

All prices are figured and quoted to the contractors on the basis of prices of the material delivered to the specific job site, including freight at the regularly established common carrier rate, and in the specific amounts, sizes and lengths to conform to the job engineering plans and specifications.

Cast iron pipe is heavy and expensive. Freight is a significant portion of the delivered sales price. Practically all pipe is paid for by the customer out of the proceeds of the job on which the pipe is used. No sales are made until the sales agents secure a legal description of the specific real estate where the pipe is to be buried in the ground for lien foreclosure purposes or a description of the contractor's bond, if the job is a bonded one.

Respondent maintains strict control and has complete responsibility over all arrangements for the delivery of pipe to the job site. No pipe is sold at prices f.o.b. plant, plus freight, but all pipe is quoted and sold at prices delivered to a specific job site, including freight. Through its sales agents, irrespective of the method of delivery employed by respondent, and in the case of every sale respondent liter-

ally follows the pipe right into the ground to insure collectibility of each account out of the proceeds of each job. All sales are individually quoted and priced on a delivered basis to contractors at the specific job site and point of use where the pipe will be buried in the ground. Respondent, legally and in fact, is obligated to effect delivery of the pipe to the job site.

Respondent normally effects delivery of pipe to the job site (a) by common carrier, truck or rail, (b) in some cases, by its own trucks where the job site is in a remote or isolated area, or (c) as in the cases here involved, by employing and paying the customer-contractor to haul the pipe to the specific job site. In no case is a customer permitted by respondent to haul the pipe to the job site unless respondent is completely satisfied the contractor has adequate handling and transport facilities to effect the haul and adequate insurance in force covering any damage to the pipe in transit.

The bulk of respondent's sales are shipped by common carrier with freight prepaid. In the cases here involved, the customer was paid the regularly established tariff rate to the out-of-state job site not in cash but by credits against the delivered invoiced prices.

Irrespective of the method of delivery employed by respondent, the contractual documents with the customer are exactly the same, including quotation forms, invoice forms and bill of lading forms.

The engineering plans and specifications covering each job generally show its precise location, the specific sizes and lengths of pipe and related material needed for the job, how

and where the pipe is to be laid in the ground, etc. Respondent's quotations to all bidders show on their face the name and out-of-state location of the job and prices delivered to the specific job site for the specific list of pipe materials set forth in the plans and specifications. The prices quoted are shown as delivered prices to the job site, f.o.b. foundry, and with full truckload freight allowed to destination. The invoices show the name and address of the customer, the name and out-of-state location of the project and the out-of-state final destination of the material. The customer's truck driver, exactly as in the case of common carrier shipments, signs a standard form of bill of lading showing respondent's name as consignor, the customer's name as consignee and the job site location by town and state under "Destination."

The contractual documents clearly obligate respondent to effect a delivery of material to a specific out-of-state job site for a delivered price regardless of the method of delivery employed, whether by common carrier, its own trucks, or by customer truck. Provisions passing title f.o.b. foundry were inserted for the purpose of helping insure careful handling and unloading by the customer alongside trenchsite at destination and as some protection against breakage or damage in transit. In practically all cases, however, of damage to material in transit, claims against the carrier or insurance company are processed by respondent's traffic department and not by the customer.

All of the interstate sales here involved were in fact shipped across the state line to the out-of-state job sites according to contract and none were diverted to local intrastate use. Further, the bulk of the sales involved have al-

ready been subjected to sales or use tax by and in the states of destination.*

Although the sales and contractual arrangements were exactly the same in all cases, petitioner here singled out for tax those interstate sales delivered by customer truck and left untouched those delivered by common carrier, truck or rail, or by respondent's own trucks.

The sales contracts here involved were negotiated and effected (subject to home office approval) by respondent's sales agents at their out-of-state sales offices, having sales jurisdiction over the particular territories to which the out-of-state shipments were made.

The testimony showed that respondent, a relatively small producer of pipe in the industry, and with a relatively limited market in Utah itself, is subjected to intense competition from its competitors throughout the west, especially from United States Pipe and Foundry Company, the giant of the industry, with a plant in California. The evidence also showed that the states of manufacture and origin of respondent's competitors, whether Birmingham, Alabama, Council Bluffs, Iowa, Decoto, California, or elsewhere, in no case attempt to levy a similar sales tax as here proposed on sales of pipe to out-of-state job sites. Respondent would thereby suffer a severe competitive injury and automatically be placed at a 2 per cent (now 3) competitive disadvantage with its competitors shipping from Iowa,

* The evidence showed that 68.9 per cent of all the sales involved herein have already been taxed by the states of destination, the only exceptions being those shipments into Idaho and Montana where no sales or use tax law is presently in force.

California, Alabama or elsewhere, whether the state of destination has or has not a sales and use tax law.

ARGUMENT

1. *The writ should not be granted because the decision of the Utah Supreme Court is in complete accord with prior decisions of this Court.*

What has been taxed here by Utah, the state of the seller, are the gross receipts, without apportionment, from interstate sales of cast iron pipe into specific out-of-state governmental sewage and waterworks jobs where under exactly the same set of contractual documents, seller paid the customer, instead of a common carrier, the established tariff rate to haul the pipe to the out-of-state job sites. A decision in favor of the state in this case would have restricted the protection of the Federal commerce clause to common carrier shipments even though in both classes of shipment title passed f.o.b. foundry and in neither class were there any diversions to local intra-state use by purchaser's breach of contract. In both classes of cases, the manifest certainty of shipment to out-of-state job site destination was equally plain.

The case is, of course, admittedly one of special facts and turned below on its special facts. The Utah Supreme Court found that the contract clearly called for an out-of-state shipment at a delivered price, including freight to destination, that seller paid freight to the customer for the interstate haul under the contract and bill of lading to the jobsite by crediting the tariff to the purchaser, that it was highly improbable, if not almost impossible, to conclude

the goods could be diverted to local use, that seller had no intent to circumvent any tax laws of the state or evade taxation, that the mere possibility of diversion to local use by purchaser's breach of contract could not, under the cited decisions of this Court, sustain or justify the tax.

Adams Manufacturing Company v. Storen, 304 U.S. 307 (1938), *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), and *Freeman v. Hewit*, 329 U.S. 249 (1946), hold that the state of the seller cannot under the Federal commerce clause tax the unapportioned gross proceeds of an interstate sale. The decisions of this Court do, however, uphold the right of the state of the buyer to impose a sales or use tax on such proceeds.* The bulk of the sales here having already in fact been subjected to sales or use tax in the states of destination — although the Utah Supreme Court makes no particular, or any, point of this fact — double taxation of the gross receipts from the same interstate sales by the states of both origin and destination was here not merely a theoretical risk but an actual fact.

Any holding that the sales here involved were fully consummated locally, that the interstate shipment to out-

* Sales Taxes: Banker Brothers v. Pennsylvania, 222 U.S. 210 (1911)
Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923)
Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935)
McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940)

Use Taxes: Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932)
Edelman v. Boeing Air Transport, 289 U.S. 249 (1933)
Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934)
Henneford v. Silas Mason Co., 300 U.S. 577 (1937)

of-state job sites was merely an unrelated matter of the purchaser's subsequent intention having no connection with the seller, would not have accorded with the facts of the case.

The Utah Supreme Court simply holds that the theoretical possibility of diversion to local intra-state use by a purchaser's breach of contract — which did not occur — could not under the decisions of this Court sustain the tax. Moreover, it likewise follows the historic rule of this Court in both export and interstate commerce cases that the means of shipment are unimportant so long as the certainty of the foreign destination is plain. The test under the decisions of this Court is simply the manifest certainty of the out-of-state or foreign destination *under the facts of the case*. It is true the Utah Court, in its opinion, cites for this test chiefly the language in *Richfield Oil Corp. v. State Board*, 329 U.S. 69 (1946), an export case. But the *Richfield Oil* opinion shows that, for this purpose, the test of manifest certainty of out-of-state destination is equally applicable to an interstate commerce case. The opinion, it will be recalled, quotes the phrase 'manifest certainty of the destination' from this Court's earlier opinion in the *Superior Oil* case, a case involving interstate commerce.

The petition essentially rests on the contention that the decision below is in conflict with *Superior Oil Co. v. Mississippi*, 280 U.S. 390 (1930), *Dept. of Treasury of Indiana v. Wood Preserving Corp.*, 313 U.S. 62 (1941), and *International Harvester Co. v. Dept of Treasury*, 322 U.S. 340 (1944). These cases, however, are unlike the case at bar.

In the *Superior Oil* case, oil and gasolene were sold and delivered to fish packers at wharves in Biloxi, Mississippi.

The subsequent transport by packers' boat 'to the neighborhood of Grants Pass, Louisana,' for resale to shrimp fishermen, was under a fictitious bill of lading without any use or purpose other than to give a color of interstate commerce to a clearly domestic transaction. "The seller of course paid no freight." "There was no consignee at the point of destination." "There was no point of destination for delivering the oil but merely a neighborhood. . ." The "gasolene was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes." "The only purpose of the vendor . . was to escape taxation."

In the case at bar, the sale and delivery of pipe to the out-of-state job site was not under a fictitious bill of lading. It was not delivered to a 'neighborhood' but to specific trench site for burial at a specific location on a specific sewage or waterworks job. It was not a sale for some later resale but a sale to a contractor for a specific final use and consumption on a specific job. The seller paid the freight by crediting the established tariff rate against the delivered purchase price. There was a specific consignee at a specific point of destination. The pipe was not in the hands of the purchaser to do with as it liked but to deliver it to a specific job site where it would later be paid for out of the proceeds of a particular job. Finally, as the Utah Supreme Court stated, the documents of sale and transportation here were not "an evasive gesture to avoid taxation."

In the *Wood Preserving* case, the wood ties were sold and delivered in a transaction fully consummated in Indiana. The shipment by the railroad outside the state for

creosoting treatment of the ties by the seller's subsidiary, a separate company, was a separate transaction under a separate and distinct contract. The seller paid no freight and showing its name as consignor was of no consequence in view of the completed delivery in Indiana.

The ties were not sold and delivered to the railroad at a delivered price, including freight, to and for burial at a specifically described out-of-state job site on the railroad's line of track. The railroad when the ties were delivered in Indiana, was free to do with the ties as it saw fit. It could have stored or creosoted or otherwise used the ties locally.*

Likewise, in the *International Harvester* case, the Class D sales, as stipulated by the parties, involved sales by an Indiana seller of Indiana goods to an out-of-state buyer who came to Indiana, took delivery there and transported the goods to another State. The sale and delivery were fully consummated locally. There was nothing in the transaction which required either seller or buyer to transport the vehicles and implements outside the state. There was

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* The petition in the Wood Preserving case for a writ of certiorari filed by the Indiana tax authorities, states (p. 43):

"The case is wholly unlike the case where the ultimate destination of the product as the goods of the buyer required delivery to the buyer across state lines. Here the delivery to the Railroad Company had been completed in Indiana, and the only shipment across state lines was for the purpose of having a service applied to the products already fully owned by the Railroad Company; and even that shipment was wholly under the control of the Railroad Company. There was no requirement created either by the contract, the character of the goods purchased, or the character of the purchaser that the ties be transported."

nothing in the contract which prevented the customer, whether dealer or retail purchaser, from using, storing or reselling the goods in Indiana. The sales were not at delivered prices, including freight, for delivery and use at specific out-of-state job sites. A purchaser's intention to transport the goods outside Indiana (if he had such an intention) was of no concern to the seller and had no connection with the contract. A purchaser if he in fact transported the goods to his out-of-state place of business may have saved some freight but he was not *paid* freight by the seller, either in cash or by credit, to haul specific goods to a specific out-of-state destination. The International Harvester case is thus a pure 'intention' case.*

The interstate transportation of pipe here involved being incidental to and in furtherance of the primary construction business of the contractor-customers of respondent, constitutes private carriage under the Federal law applic-

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* This is abundantly clear even in the Harvester Company's brief filed in this Court opposing appellees' motion to dismiss appeal or affirm decision of State court, which states (pp. 7-8):

"It is true that in the class D sales the buyer would have complete control of the article in Indiana, but it is absurd to think there was any practical possibility that he would do anything with it but take it back to his own home town, which he did do. If the buyer were a dealer he *intended* to take it to his place of business. If the buyer were a user he *intended* to take it to his home. He had no other place of business and he had no other home." (Italics supplied).

Appellees' reply in their statement of matters and grounds making against the jurisdiction of this Court, etc., (p. 10) was as follows:

"That the buyer intended to transport the goods purchased into another State; that the buyer intended to resell them or that the buyer had any particular intent, is therefore, wholly immaterial."

able to motor carriers, whether or not the contractor happens to make a profit from the transportation activity and whether title passes to the contractor f. o. b. point of origin or point of destination. See: *Williams Bros. Corp. Cont. Car. App.*, 44 Motor Carrier Cases (ICC) 557 (Div. 5) (1945); *Brooks Transp. Co., Inc. v. United States*, 93 Fed. Sup. 517 (1950) (E. D. Va.), affirmed 340 U.S. 925, (also affirming *Lenoir Chair Co. Cont. Car. App.*, 51 MCC 65).

The cases relied on by petitioner, furnish no support for the granting of a writ of certiorari in this case.

2. *The writ should not be granted because the question involved is of no substantial importance to anyone, except this respondent.*

Respondent concedes that the decision of the Utah Supreme Court in this case is a very interesting one. It is made not the less so, by reason of the fact that the state of the seller has here attempted to tax the same proceeds of interstate sales already taxed by the state of the buyer. It thus involves in fact what the several decisions of this Court marking out the boundaries of state power in this area have had to treat as merely a potential risk. Here the Utah Court came to the bridge long anticipated by the decisions of this Court and crossed it.

This does not mean, however, that the question is of any substantial importance to taxing authorities generally. It was a case of special facts and turned on special facts. It obviously does not discredit, as claimed by petitioner, any decision of this Court, least of all the International Harvester decision.

Petitioner attempts to stress the 'difficult burden of extracting proof' in cases of sales of property for out-of-state use as a reason here for the granting of certiorari. The obvious answer to this suggestion is that factual determinations cannot be avoided in administrating any tax law. A factual determination of the 'manifest certainty' of an out-of-state destination should present no particular or extraordinary difficulty. If the facts do show such 'manifest certainty,' as here, a state should not be permitted in the words of the Utah Supreme Court to "obfuscate the true purpose and intent of the commerce clause."

The case was of critical importance to respondent but to no one else. The double tax on the same transactions by the states of both seller and buyer here put respondent's back to the wall in a practical competitive way. Its competitors do not pay a double tax. Further, the customer relationships involved here are such that respondent can shift to the consumer the tax in the buyer's state of destination and use. Competitively and economically, however, the transactions cannot also absorb a tax on the gross proceeds of sale by the state of manufacture and origin without extremely serious injury to respondent's vital interstate business.

3. *The writ should not be granted because the decision may rest on an adequate state ground.*

The Utah sales tax law exempts from tax "sales which the state of Utah is prohibited from taxing under the Constitution or laws of the United States." (Sec. 59-15-6, U.C.A. 1953). The sales tax regulations defining interstate commerce are set forth on pages 12-13 of the petition. These state regulatory definitions provide that to constitute interstate commerce:

"1. The transaction must involve actual and physical movement of the property sold across the state line.

2. Such movement must be an essential and not an incidental part of the sale.

3. The seller must be obligated by the express or unavoidable implied terms of the sale or contract to sell to make physical delivery of the property which forms the subject matter of the transaction across a state boundary line to the buyer."

It is, of course, clear from the facts outlined in the opinion of the Utah Supreme Court that all three of the above definitional tests are met. All of the goods moved across the state line as an essential part of the sale under contracts legally obligating the seller to make delivery to the out-of-state job sites. The transactions are, therefore, exempt from tax by reason of the Utah State Tax Commission regulations, duly issued under the statute and having the full force and effect of state law. The question of the existence of an adequate state ground is therefore debatable.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Office Supreme Court, U.S.
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No. 178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

STATE TAX COMMISSION OF UTAH, *Petitioner*,

v.

PACIFIC STATES CAST IRON PIPE COMPANY, a corporation, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR PETITIONER

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitution and statutes involved	2
Statement	3
Summary of argument	6
Argument	7
I. A non-discriminatory sales tax imposed upon goods sold and delivered to a purchaser within the boundaries of a seller's state does not constitute a burden on interstate commerce under Article 1, Section 8, of the United States Constitution	7
A. The sales herein become closed and constitute local transactions upon passage of title and delivery of possession within the seller's state	7
B. Manifest certainty of out-of-state destination and use of materials does not transmute an otherwise intrastate sale into one in interstate commerce	17
C. That some of the materials herein may have been subjected to a use tax by a state of destination does not constitute a subsequently imposed sales tax upon a prior local event involving their acquisition a burden upon interstate commerce	25
Conclusion	27

CITATIONS

Page

CASES:

Adams Manufacturing Co. v. *Storen*, 304 U.S. 307 12

Aero-Mayflower Transit Co. v. *Board of Railroad Commissioners*, 332 U.S. 495 17

Alaska v. *Artic Maid*, 366 U.S. 199 17

Dept. of Treasury of Indiana v. *Wood Preserving Corp.*, 313 U.S. 62 ..... 6, 13

Eastern Air Transport v. *South Carolina Tax Commission*, 285 U.S. 147 21

Empresa Siderurgica, S. A. v. *Merced*, 337 U.S. 154 ..... 21, 22

Freeman v. *Hewit*, 329 U.S. 249 ..... 12, 27

Gwin, White & Prince, Inc. v. *Henneford*, 305 U.S. 434 12

International Harvester Co. v. *Treasury*, 322 U.S. 340 ..... 6, 15, 22, 26

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 17

McGoldrick v. *Compagnie Generale Transatlantique*, 309 U.S. 430 ..... 17, 20

McGoldrick v. *Gulf Oil Corp.*, 309 U.S. 414 ..... 17, 19

McLeod v. *J. E. Dilworth Co.*, 322 U.S. 327 25

Rickfield Oil Co. v. *State Board*, 329 U.S. 69 ..... 7, 17, 21

Superior Oil Co. v. *Mississippi*, 280 U.S. 390 11

Western Livestock v. *Bureau*, 303 U.S. 250 ..... 7, 25

Whitmore Oxygen Co. v. *State Tax Commission*, 114 Utah 1, 196 P. 2d 976 10

Wiloil Corporation v. *Pennsylvania*, 294 U.S. 169 8

Page

CONSTITUTION:

Federal Constitution, Art. I, Sec. 8 2

STATUTES:

Arizona Revised Statutes

Section 42-1409 26

Utah Code Annotated, 1953, as amended

Section 54-6-1 9

Section 54-6-9 ..... 4, 9

Section 59-15-2(5) 2, 8

Section 59-15-4(a) 2, 7

Section 60-1-1(2) 8

New Mexico Statutes

Section 72-17-4 26

MISCELLANEOUS:

Barrett, "*Substance*" *versus* "*Form*" *in the Application of the Commerce Clause to State Taxation*, 101 University of Penna. Law Rev. 740, 776 25

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Utah Supreme Court (R. 88-97) is reported at 13 Utah 2d 113, 369 P.2d 123.

JURISDICTION

The judgment of the Utah Supreme Court was entered on February 20, 1962 (R. 97). A timely petition for rehearing was filed March 12, 1962 (R. 98). That petition was

denied on March 26, 1962 (R. 98). The petition for writ of certiorari was filed June 13, 1962, and was granted October 8, 1962, (U. S. ....., 9 L.Ed.2d 53. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

I. Whether a tax required by state law to be imposed on every consummated transaction of sale constitutes a burden on interstate commerce when imposed upon goods sold and delivered in Utah to a purchaser, and thereafter transported by said purchaser, pursuant to contractual agreement with the seller, to an out-of-state destination for use and consumption.

CONSTITUTION AND STATUTES INVOLVED

The case directly involves the following:

Article I, Section 8, of the Constitution of the United States, which reads in part:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."

Utah Code Annotated, 1953, pertinent sections of which provide:

> 59-15-4. Excise Tax—Rate. "From and after the effective date of this Act, there is levied and there shall be collected and paid:
>
> (a) A tax upon every retail sale of tangible personal property made within the state of Utah equivalent to two per cent of the purchase price paid or charged . . ."
>
> 59-15-2(b). "The term 'sale' or 'sales' includes installment and credit sales, and the exchange of pro-

perties as well as the sale thereof for money, every closed transaction constituting a sale . . ."

STATEMENT

This case is an original proceeding in the Supreme Court of the State of Utah to review an order and decision of the State Tax Commission of Utah (referred to herein as the "Tax Commission"). The Tax Commission imposed sales tax liability upon the respondent, Pacific States Cast Iron Pipe Company (referred to herein as the "Pipe Company"), for sales made by it of cast iron pipe and related commodities to contractors within the State of Utah, which materials were subsequently transported outside the state for use and consumption.

The essential facts are not in dispute. They are set forth in substance by the Utah Supreme Court in its opinion below (R. 88-97). They show that respondent is a Nevada corporation, duly qualified to do business in the State of Utah, and is engaged in the manufacture and sale of cast iron pipe and related items (R. 1). This pipe is manufactured in Provo, Utah, and is sold throughout the Western States (R. 1).

The Tax Commission proposed a sales tax deficiency against the Pipe Company on sales of cast iron pipe by it to various contractors wherein the contractor, as purchaser, took delivery of materials from the Pipe Company in the contractor's own trucks at respondent's plant near Provo, Utah (R. 7-8).

All of the sales which were subjected to this deficiency assessment were solicited by means of quotations given by the Pipe Company to contractors bidding on various out-

of Utah jobs; and the materials purchased as a result of these quotations were purchased for use on specific out-of-state jobs and were of specified sizes and lengths to conform to the specifications covering the particular project involved (R. 73-74).

The original quotations contemplated delivery of goods sold to the purchaser at the worksite outside the State of Utah (Ex. 4(b); R. 42, 147-159) (Ex. 5(b); R. 43, 169-170) (Ex. 6(b); R. 43, 195-197) (Ex. 7(b); R. 43, 243-249). However, the parties by subsequent correspondence or dealings modified this requirement, and agreed that delivery should be made to the buyer at the Pipe Company's foundry, f.o.b. Provo, Utah (Ex. 4(c); R. 42, 153) (Ex. 4(e); R. 42, 157) (Ex. 5(c); R. 43, 171) (Ex. 5(d); R. 43, 174) (Ex. 6(b); R. 43, 197) (Ex. 6(e); R. 43, 204) (Ex. 7(d); R. 43, 259, 261) (Ex. 7(e); R. 43, 262). The invoices and bills of lading which represent the transactions further show that title to the pipe passed within the State of Utah when it was delivered to the buyer at the place agreed upon and that the buyer was thereafter responsible for the payment of freight and other charges accruing against the property (Ex. 4(d); R. 42, 155) (Ex. 4(e); R. 42, 158) (Exhibits 5, 6 and 7 contain information of a similar import and are typical of transaction herein. R. 72).

Hereafter, both vendor and vendee considered the pipe to be the exclusive property of the vendee. The record shows that the buyers thought they were carrying their own goods, and as a result did not obtain the permit required by Section 59-6-9, Utah Code Annotated, 1953, of all interstate contract motor carriers transporting property for hire (R. 50, 71).

Based upon the stated facts, the Tax Commission concluded that the respondent Pipe Company was responsible, under Utah law, for the collection and payment of sales tax on those items only which it sold f.o.b. Provo, Utah, to contractors coming within the State of Utah to accept delivery. It further concluded that title to all materials so purchased and delivered passed in the State of Utah and that, therefore, the more than four million dollars worth of transactions were not sales in interstate commerce (R. 77).

The respondent Pipe Company objected to these conclusions, contending that it was legally obligated to effectuate delivery outside the State of Utah; and, as the quoted prices called for a sale f.o.b. foundry plus freight to the job site, and, as the materials were concededly purchased for out-of-state use, that there was sufficient certainty of out-of-state destination to require a finding that the sales were, indeed, in interstate commerce (R. 9-22). Respondent further contended that the risk of multiple taxation herein constituted a test for invalidity of the tax under the Commerce Clause (R. 23-24).

The Tax Commission, in its decision of May 23, 1961, upheld the proposed tax deficiency against the respondent (R. 73-78). Respondent thereupon filed a petition for writ of certiorari with the Supreme Court of Utah (R. 78-86). It therein raised the federal question here sought to be reviewed by asserting that the imposition of the tax was a burden on interstate commerce, prohibited by the Commerce Clause of the United States Constitution (R. 78, 80).

The Supreme Court of Utah, after hearing arguments

thereon, reversed the decision of the Tax Commission and stated in its opinion the constitutional grounds which the Pipe Company had asserted, namely, that the state statute as applied under the facts of this case reflected "a situation offensive to the Commerce Clause" (R. 88, 91).

The Tax Commission filed a timely petition for writ of certiorari which was granted by this Court on October 8, 1962.

SUMMARY OF ARGUMENT

Utah law requires that a sales tax be imposed upon every closed transaction of sale. Where both vendor and purchaser are present, and where passage of title and delivery of possession to the vendee occur in Utah, the sales transaction becomes closed and results in a local event taxable by the state. *International Harvester Co.* v. *Treasury*, 322 U.S. 340. Such transactions must be distinguished from interstate sales, which require, as an essential part of the sale, and necessary to its consummation, the movement of materials purchased across state boundary lines.

A contractual agreement between seller and buyer to the effect that the buyer will thereafter transport the materials so purchased to an out-of-state site for use and consumption does not convert the sale into one in interstate commerce. *Dept. of Treasury of Indiana* v. *Wood Preserving Corp.*, 313 U.S. 62. Such an agreement, if valid, is merely incidental to the sale and not a necessary part thereof in view of the fact that purchaser has received title and possession before entering into the agreement. Similarly, an agreement by the seller to pay freight to an

out-of-state destination does not transmute an intrastate sale into an interstate sale free from local tax burden.

The Utah Supreme Court mistakenly applied the rule of *Richfield Oil Co. v. State Board*, 329 U.S. 69, to the facts of this case. For purposes of state taxation of sales, manifest certainty of out-of-state destination of materials purchased should not be controlling. That which is important is that the tax be one which in form or substance cannot be repeated by another state in such a manner as to lay an added burden on interstate distribution (*Western Livestock v. Bureau*, 303 U.S. 250).

The further fact that the state of use may have imposed a use tax on the materials in question after their transportation from Utah does not bar the latter state from subsequently imposing a sales tax upon the fully consummated sale within its borders.

ARGUMENT

A NON-DISCRIMINATORY SALES TAX IMPOSED UPON GOODS SOLD AND DELIVERED TO A PURCHASER WITHIN THE BOUNDARIES OF A SELLER'S STATE DOES NOT CONSTITUTE A BURDEN ON INTERSTATE COMMERCE UNDER ARTICLE I, SECTION 8, OF THE UNITED STATES CONSTITUTION.

A. THE SALES HEREIN BECOME CLOSED AND CONSTITUTE LOCAL TRANSACTIONS UPON PASSAGE OF TITLE AND DELIVERY OF POSSESSION WITHIN THE STATE.

The tax involved herein is a "tax upon every retail sale of tangible personal property made within the State of Utah equivalent to 2 per cent [now 2½ per cent] of the purchase price paid or charged . . ." Utah Code Annotated 59-15-4(a).

A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price. Utah Code Annotated 60-1-4(2).

For purposes of the Sales Tax Act every closed transaction constitutes a sale. Utah Code Annotated 59-15-2(b).

A sale which requires transportation of goods across a state boundary *as an essential element of the contract of sale* is said to be a sale in interstate commerce; and the courts have construed Article I, Section 8, of the Federal Constitution to prohibit the states from laying a tax upon such a sale. See *Wiloil Corporation* v. *Pennsylvania*, 294 U.S. 169.

Petitioner contends that the sales transactions herein are fully consummated in Utah and become closed and taxable local events within that state. Any transportation incurred in connection with such a sale is merely incidental and subsequent thereto.

The petitioner submits that the vendor is not obliged to make a physical delivery across the state boundary line when the purchaser has already accepted title and delivery in Utah. Nor is the movement of goods an essential part of the sale thereof when title and possession are previously in a purchaser within the seller's state.

It is true that the quotations originally issued by respondent to contractors herein contemplated out-of-state delivery. However, the parties by subsequent correspondence and dealing modified this requirement and agreed that delivery should be made to the buyer at respondent's foundry, f.o.b., Provo, Utah. (For example see Ex. 7(d); R. 43, 261.)

The Tax Commission found that title passed within the State of Utah when the goods were so delivered to buyers at the place agreed upon (R. 77). This finding has not been challenged. At the time of delivery both vendor and vendee considered the cast iron pipe sold to be the exclusive property of the vendee. In fact, one of the major contractors stated, at the hearing before the Tax Commission, "You don't need a license to carry your own products." (R. 71)

Section 54-6-1, Utah Code Annotated, 1953, defines a contract motor carrier of property to mean any person engaged in the transportation of property for hire not included in the definition of common motor carrier of property. Section 54-6-9, Utah Code Annotated, 1953, provides:

> "It shall be unlawful for any contract motor carrier to operate as a carrier in interstate commerce within this state without first having obtained from the commission a permit therefor . . ."

The purchasers herein did not have a permit or certificate issued by the Utah Public Service Commission, and none was required by the Pipe Company of its vendees (R. 50, 57, 71). The Tax Commission concluded, therefore, that the purchasers were not shipping for hire, were not contract carriers, indeed could not be, and were under no obligation to the vendor to deliver the material so purchased outside the State of Utah (R. 76).

This conclusion is fully supported by the various provisions of the bill of lading signed by the purchaser upon receipt of the pipe at respondent's foundry. Section 1(a) on the reverse side of the bill of lading, under a heading

"Contract Terms and Conditions" provides:

> "The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto . . ." (Ex. 4(d); R. 42, 155) (Ex. 5(d); R. 43, 175) (Ex. 6(d); R. 43, 202) (Ex. 7(d); R. 43, 260).

Section 7 of the same bill of lading provides:

> "The owner or consignee shall pay the freight and overage, if any, and all other lawful charges accruing on said property . . ." Id.

The invoices under which the goods are shipped provide, as part of their terms and conditions:

> "4. Delivery is to be made F.O.B. seller's foundry, upon which sellers' responsibility ceases.
>
> 5. Freight charges when included in the selling price, are to be paid by the buyer. Freight allowance is based on a specific rate to agreed destination and when shipments are forwarded freight collect the amount of freight is to be deducted by us on the face of the invoice. Consignee assumes the risk in paying any additional charges without our consent." (Ex. 4(e); R. 42, 158), (Ex. 5(e); R. 43, 178) (Ex. 6(e); R. 43, 205) (Ex. 7(e); R. 43, 263).

These provisions negative any claim that the sale was not complete upon delivery to the purchaser in Utah. Delivery across a state line is not necessary or required to effectuate the passage of title or the completion of the sale. The purchaser has complete and full title to the pipe at the time it is taken into its vehicles for transportation out of Utah. *Whitmore Oxygen Co.* v. *State Tax Commission*, 114 Utah 1, 196 P.2d 976. Transportation thereafter is only incidental to the contract of sale, passage of title and de-

livery of possession having preceded such transportation.

A closely parallel fact situation was presented to this Court by *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390. In that case Superior Oil Co., a corporation created and doing business in Mississippi, sold gasoline in Mississippi to packers and delivered it at the packers' wharves. The packers loaded the oil upon their own fishing boats and delivered it downstream to fishermen in Louisiana. Superior Oil Co. received, in each case, from the purchaser a bill of lading signed by the master of the boat on which the oil was loaded and reading in part:

> "Consigned to [purchaser]. Destination: Grants Pass, La. By boat Frank Louis, owned or operated by Gussie Fontaine Pkg. Co." Id. p. 394

The instrument then provided that:

> "The property consigned herein remains the property of said Superior Oil Company until it shall be delivered to consignee or consignee's agent at point of destination." Id. p. 394

with other provisions throwing all risks upon the purchaser.

This Court said:

> "The document seems to have had no other use than, as the Supreme Court of Mississippi said, to try to convert a domestic transaction into one in interstate commerce. There was no consignee at the point of destination. The goods were delivered to the so-called consignee before they started, and were in its hands throughout." Id. p. 394

So, here, the bill of lading, under which respondent claims to be obliged to make out-of-state delivery, only serves to try to convert a domestic transaction into one in interstate commerce.

The respondent contends that the imposition of the sales tax as proposed by the Tax Commission is a burden on interstate commerce prohibited by the Commerce Clause of the Federal Constitution, and cites as principal authority for this proposition: *Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434, and *Freeman* v. *Hewit*, 329 U.S. 249. All of these cases involved the application of an Indiana gross receipts tax to the gross proceeds of an interstate sale. These leading cases reflect situations in which the state of the seller imposed a gross receipts tax on a sales transaction consummated within its boundaries, the title passing within the state but delivery and possession being taken in a foreign state.

The case of *Freeman* v. *Hewit*, 329 U.S. 249, was further distinguished by this Court, when it said:

> "... the tax now here is not a 'tax on the transfer of property' within the State, which was the basis for sustaining this tax in *Harvester Co.* v. *Dept. of Treasury*...." 329 U.S. 249, 258.

The *Freeman* v. *Hewit* case dealt with an Indiana resident who ordered his broker to sell certain securities for him. The sale was arranged and took place on the New York Stock Exchange through a New York broker. The receipts were remitted to the seller, who was subjected to an Indiana tax upon the entire gross income of residents. Such a case is certainly not precedent in the instant matter.

Respondent contends it is obliged to make deliveries out of Utah by virtue of the bills of lading referred to above. In this regard the case of *Department of Treasury*

of Indiana v. *Wood Preserving Corp.*, 313 U.S. 62, is significant. There the validity of the Indiana gross income tax was challenged. The Wood Preserving Corporation brought suit to recover taxes collected from it by the State of Indiana, on the ground that such taxes were invalid under the Federal Constitution, as laid upon income received outside the state, thus constituting an unlawful burden upon interstate commerce.

The corporation, having its principal place of business at Pittsburgh, Pennsylvania, but with an office at Marietta, Ohio, was engaged in the business of treating railroad ties by creosoting them, and also in the business of purchasing ties and selling them to railroads with whom it had contracts for tie treatment.

The taxes in question were laid upon the corporation's gross receipts from the sale of ties to the Baltimore & Ohio Railroad Company in the State of Indiana in accordance with certain contracts. One contract provided for the sale of raw ties by the corporation to the Baltimore & Ohio Railroad Company, delivered f.o.b. cars on the railroad tracks, while the supplemental contract required that all such ties delivered to the railroad in Indiana should be shipped to the corporations' plant at Finney, Ohio, for treatment.

The taxes in question were levied by the Indiana taxing authorities on the gross receipts which the corporation derived from the sale of the untreated ties, pursuant to an Indiana statute providing for a tax upon gross income derived from sources within the State of Indiana of all nonresident persons and corporations. The sales receipts did

not include charges for the creosoting treatment; these being separately billed to the railroad company when the treatment was completed. This court, speaking through Mr. Chief Justice Hughes, in an unanimous opinion, said at 313 U.S. 67:

> "Further, as the sole object of the challenged tax is the income derived from respondent's sales to the Railroad Company, there is no occasion for apportionment. The creosoting operations in Ohio, and the income derived from them, were not involved. And the fact that the ties which were sold to the Railroad Company were purchased by respondent through orders given to the Indiana producers from respondent's Marietta office cannot affect the authority of Indiana to tax the receipts from intrastate activities of respondent in its dealings with the Railroad Company." (Citing cases)

And continued at p. 68:

> "These were local transactions—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were nonetheless intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for that treatment called for treatment of ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad Company in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. *Respondent did not pay the freight for that transportation, and the circumstance that the billing was in its name as consignor is not of consequence in the light of the fact showing the completed delivery to the Railroad Company in Indiana.*" (Emphasis supplied.)

The case of *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340, is also relied upon by this petitioner. There, the State of Indiana assessed a gross receipts tax on certain classes of sales by the plaintiff, International Harvester Company. The plaintiff was authorized to do business in Indiana but incorporated under the laws of another state. Among the items said to be taxable by the state were certain sales described by the Indiana Supreme Court as:

> "Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this State."

This Court said:

> "The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to Indiana, takes delivery there and transports the goods to another State. . . . Moreover, both the agreement to sell and the delivery took place in Indiana. Those events would be adequate to sustain a sales tax by Indiana. In *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, we had before us a question of the constitutionality of a New York City sales tax as applied to purchases from out-of-state sellers. The tax was 'laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price.' Id., p. 43. And it was 'conditioned upon events occurring' within New York, i.e., the transfer of title or possession of the purchased property. Id., pp. 43-44. Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. *But in each a local transaction*

is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce." 322 U.S. 345, 346. (Emphasis supplied.).

And concluded:

"We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. *Such 'local activities or privileges' . . . are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage.*" 322 U.S. 349.

Petitioner submits that the activity taxed in the present case is wholly intrastate. The tax herein is conditioned upon local activity; that is, the delivery of goods sold to a purchaser within the State of Utah. Such a sale is distinct, for purposes of interstate commerce, from a sale either f.o.b. point of origin or point of destination, delivered to a common carrier and received by the purchaser outside the taxing state. This is because in the first instance all of the legal requisites of a sale are completed within the borders of the taxing state. In the latter, an interstate common carrier is necessary to effectuate delivery to the ultimate purchaser and its is questionable whether or not the essential element of delivery occurs within the state. The first is a taxable local event; the second may or may not be subject to a sales tax by the state of the seller, but this fact situation is not before the Court.

The activity taxed herein is one which, apart from its relationship to interstate commerce because of the very

nature of the purchaser, is subject to the state taxing power. The effect of the tax, even though upon a sale of goods intended to be transported from the state, is neither to discriminate against nor obstruct interstate commerce more than other state taxes which have repeatedly been sustained as involving no forbidden interference with interstate commerce. See *Aero-Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U.S. 495; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33; *Alaska* v. *Arctic Maid*, 366 U.S. 199.

B. MANIFEST CERTAINTY OF OUT-OF-STATE DESTINATION AND USE OF MATERIALS DOES NOT TRANSMUTE AN OTHERWISE INTRASTATE SALE INTO ONE IN INTERSTATE COMMERCE.

Petitioner submits the Court below erred in holding that the rationale of the *Richfield Oil* case, 329 U.S. 69, involving a tax of exports in foreign commerce, could be applied to a non-discriminatory sales tax upon a local activity incident to interstate commerce. This proposition can be clearly demonstrated by three cases arising under the New York City Municipal Sales Tax Law. The three cases, all decided in the year 1940 by this Court, are *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33; *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414, and *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430.

The *Berwind-White* case involved sales of coal under contracts entered into with a municipality calling for delivery therein. The contracts contemplated that the coal was to be mined in another state and was to be transported from such state to a terminal in a third state, from which

it was to be delivered to purchasers at points within the municipality of New York City. This Court, in upholding the imposition of the New York City sales tax upon such local deliveries, stated:

> "But is was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business, *Western Livestock* v. *Bureau*, 303 U.S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress .... Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation ... Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is a prerquisite to it." 309 U.S. 33, 46-47.

Then ruled:

> "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which, apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which

have been repeatedly sustained as involving no prohibitive regulation of interstate commerce." Id. p. 58.

With the *McGoldrick* v. *Berwind-White* case as a background, this Court later in the same year was called upon to decide two cases wherein the New York City sales tax had been applied to sales in foreign commerce. The first of these cases was *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414. In that case crude oil was imported from a foreign country and held in the manufacturers' warehouse pursuant to a bond given for the purpose of enabling the importer to bring such petroleum into the United States, to manufacture it while in bond as a fuel oil and then withdraw it for export or other lawful purpose free from the import duty which would otherwise be payable. The Comptroller of the City of New York determined that the respondent was subject to the City tax laid upon sales of fuel oil manufactured in New York City from crude petroleum which had been imported from a foreign country and sold and delivered as ship's stores to vessels engaged in foreign commerce. Foreshadowing the *Richfield Oil* case, it was held:

> "From the time of importation until the moment when the . . . oil is ladened upon vessels engaged in foreign trade, the imported petroleum and its product, the fuel oil, is segregated from the common mass of goods and property within the state, and is subject to the supervision and control of federal customs officers. It cannot lawfully be removed from the manufacturing warehouse except for delivery for use as fuel to a vessel engaged in foreign commerce and it cannot lawfully be diverted from such destination and cannot after delivery to the vessel, be landed in the United States . . ." 309 U.S. 414, 425-426.

And concluded:

> "The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce." (Citing cases.) Id. p. 429.

On the same day, this Court decided *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, wherein the Comptroller of the City of New York had imposed the New York City sales tax upon sales of foreign oil manufactured from petroleum imported from a foreign country, sold and delivered as ship's stores to vessels engaged in foreign commerce under an almost identical fact situation. The Appellate Division of the New York Supreme Court held that the taxing statutes constituted an unconstitutional burden on interstate commerce. 254 App. Div. 237, 4 N.Y.S. 2d 661. The Court of Appeals of New York affirmed, 279 N.Y. 192, 18 N.E.2d 828, on the single ground that the tax was unconstitutional by reason of its effect on interstate commerce, and by an amended remittitur, that Court stated that the affirmance was on the sole ground that the tax violated the Commerce Clause, 280 N.Y. 691, 21 N.E.2d 199. Counsel for the taxpayer urged this Court to consider the question of foreign commerce which had not been considered or passed upon by the lower Courts. The Court refused to consider any grounds of attack upon the statute not raised or decided in the State Court. Upon the express point submitted, that of the unconstitutionality of the New York City sales tax on the ground that it constituted a burden on interstate commerce, this Court held:

> *"So far as the validity of the tax with respect to the interstate commerce is concerned, our decision sustaining it in the Berwind-White Coal Mining Co.*

case is controlling and the judgment must be reversed . . . " 309 U.S., at 432. (Emphasis supplied.)

Thus, a sales tax was *not* an unconstitutional burden on interstate commerce when imposed on a sale of bunker fuel and diesel engine oil from tanks in New Jersey to ships engaged in foreign commerce docked in the port of New York, but under an almost identical state of facts where the foreign commerce question was pleaded, it was held that fuel oil from bonded warehouses sold in foreign commerce was not subject to the same City sales tax.

The Tax Commission respectfully suggests that the same analysis is applicable regarding the holding in the *Richfield Oil* case, 329 U.S. 69; that is, that what is prohibited in regards to foreign commerce is not necessarily an unconstitutional burden on interstate commerce. In the case of foreign commerce property is subject to the state taxing power only as long as the movement to foreign shores has neither started nor been committed. *Empresa Siderurgica, S. A. v. Merced*, 337 U.S. 154. Manifest certainty of foreign destination is sufficient to prohibit the tax under the Foreign Commerce Clause of the Constitution but is not controlling under an almost identical set of facts where the only question before the Court is interstate commerce.

A sales tax, non-discriminatory in nature, applied to the transfer of property immediately before its entrance into interstate commerce, is not an unconstitutional burden upon that commerce so as to be prohibited by the United States Constitution. See *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147; *Interna-*

tional Harvester Co. v. Dept. of Treasury, 332 U.S. 340.

The case of *Empresa Siderurgica, S.A. v. Merrell*, 337 U.S. 154, authored by Mr. Justice Douglas, is illustrative of this point and contains other language bearing upon the holding of the Court below. That case involved the sale of a cement plant to a South American corporation for export. An export license was obtained, title passed and possession was taken on behalf of the purchaser. A common carrier was employed to do the dismantling and packaging for shipment. As dismantling proceeded, shipments were labeled with the foreign company's name as consignee and delivered to a rail carrier. A personal property tax on the property was levied for the years 1945 and 1946; and the tax date was March 5, 1945. On that date 12 per cent of the plant had been shipped out of the country. That portion was relieved of the tax, and the balance was taxed. That included 10 per cent of the property which had been dismantled and crated or prepared for shipment, 34 per cent which had been dismantled and not crated or prepare for shipment, and 44 per cent which had not been dismantled at all. But before the end of January, 1946, all of the property had been shipped by rail to a port and was enroute to South America by ocean carrier. This Court was faced with the question whether or not the state tax laid upon this property was an unconstitutional tax on exports in violation of Article I, Section 10, Clause 2, of the United States Constitution. The company paid the tax under protest and brought suit to recover it. This Court said, at p. 156:

". . . goods do not cease to be part of the general mass of property in the State, subject, as such, to its

jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.' *Coe* v. *Errol*, 116 U.S. 517, 527. That test was fashioned to determine the validity under the Commerce Clause of a non-discriminatory state tax. But as we noted in *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 79, it is equally applicable to cases arising either under Article I, § 10, Cl. 2 (the Import-Export Clause) or under Article I, § 9, Cl. 5, which prohibits Congress from laying any tax on 'Articles exported from any State.'

"Under that test it is not enough that there is an intent to export or a plan which contemplates exportation, or an integrated series of events which will end with it. . . . The tax immunity runs to the process of exportation and the transactions and documents embraced in it. . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice." Id., at 156-157.

"So in this case it is not enough that on the tax date there was a purpose and plan to export this property. *Nor is it sufficient that in due course that plan was fully executed.* Part of the plant that is taxed was dismantled, but it had not been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. The fact that any such diversion would entail a breach of contract, that a part of the plant had already started on its export journey, that an export license had been obtained and a letter of credit deposited in this country increases the expectation on the tax date that exportation of the entire plant would eventuate. But that prospect, no matter

how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed." Id., at 157 (Emphasis supplied.)

So, in the present case even if the *Richfield Oil* case is controling, it is not sufficient that there was a purpose and contemplated intention to deliver across state lines, nor is it sufficient that in due course all of the material sold by the plaintiff herein was so delivered. It might still have been diverted into the domestic market. The fact that diversion would entail a breach of contract, that the material so purchased was to be used on a municipal project under engineered specifications requiring federal approval, that the material was sold by respondent pursuant to an invitation to bid on an out-of-state contract, or that other similar shipments might have been delivered by respondent to common carriers for delivery to purchasers out of the State of Utah increases the expectations that the material so purchased would be used and consumed out of the State of Utah. But that prospect does not change the fact that at the time Utah levied its non-discriminatory sales tax the materials so subjected to the tax had not started on their interstate journey, neither had they been committed to such a journey.

It is submitted that certainty of out-of-state destination, control and possibility of diversion are important in determining taxability of *property* in interstate commerce or foreign commerce, in that this determination is essential before it can be ascertained whether or not property has been sufficiently set apart from the common mass of taxable property so as to be exempt. However, in the case of

sales or gross receipt taxes on local incidents of interstate activity, certainty of out-of-state destination is not controlling. That which is controlling is that the tax be not one in form or substance that can be repeated by another state in a manner so as to lay an added burden on interstate distribution. See *Western Livestock* v. *Bureau*, 303 U.S. 250.

"Each state should be permitted to impose its sales tax upon all sales, regardless of the manner in which they are negotiated, which result in a delivery of goods to a buyer within the state." Barrett, *"Substance" Versus "Form" in the Application of the Commerce Clause to State Taxation*, 101 University of Penna. Law Review, 740, 776.

C. THAT SOME OF THE MATERIALS HEREIN MAY HAVE BEEN SUBJECTED TO A USE TAX BY THE STATE OF DESTINATION DOES NOT CONSTITUTE A SUBSEQUENTLY IMPOSED SALES TAX UPON A PRIOR LOCAL EVENT INVOLVING THEIR ACQUISITION A BURDEN UPON INTERSTATE COMMERCE.

The sales herein were subjected to tax by the states of destination in varying degrees. The Pipe Company, because of being qualified to collect use tax for the State of Colorado, withheld, collected and paid tax on transactions herein to the Colorado Department of Revenue.[1] (R. 64). These sales constitute 32.3 per cent of the total sales involved in this deficiency assessment (R. 64).

---

[1] It would appear that respondent was mistaken and erred in volunteering a 2 per cent "sales tax" to the State of Colorado as indicated by Exhibit 4(e); R. 42, 157. *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327.

No tax was assessed by respondent for sales wherein the final destination of pipe sold was within the states of Arizona, New Mexico and Wyoming. Such sales constitute 36.6 per cent of the total sales herein involved (R. 64).

The states of Idaho and Montana received the remaining 31.4 per cent of the sales herein (R. 64). At the time of the proposed deficiency, these states had no sales or use tax laws.

Respondent contends that the risk of multiple taxation upon the same sales transaction constitutes a further test of tax invalidity under the Commerce Clause. While this may be true it is to be noted that the *same sales transaction* is not doubly burdened when the sale of goods is taxed by one state and the use thereof by another. Respondent's contention is further muted by a common use tax enactment, adopted by Arizona and New Mexico, providing that property brought into the state is subject to the tax except where a tax has already been levied on the sale or use of the property by another state. See Arizona Revised Statutes § 42-1409; New Mexico Statutes, Sec. 72-17-4.

In the *International Harvester* case, 322 U.S. 340, much was said concerning double taxation with reference to the Class D sales. It was argued that the appellant there would also probably be subjected to the Illinois Retailers' Occupation Tax for some of the sales which had been included within the Indiana gross receipts tax. This Court, speaking through MR. JUSTICE DOUGLAS, answered this contention as follows:

"But it will be time to cross that bridge when we come to it. For example, in the *Wood Preserving*

> *Corp.* case the state to which the purchaser took the ties might also have sought to tax the transaction by levying a use tax. But we did not withhold the hand of Indiana's tax collector on that account." 322 U.S. 340, 348.

The possibility of double taxation is not determinative of whether either the sale or the use of pipe herein took place in interstate commerce. In this regard the words of MR. JUSTICE FRANKFURTER in *Freeman v. Hewit*, 329 U.S. 249, 256, are significant:

> "It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate commerce are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a state can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. . ."

Accordingly, petitioner submits that the right of the State of Utah to tax sales made within its borders cannot be made to depend upon whether or not a corresponding foreign use of goods purchased in Utah is taxed or is taxable in another state.

CONCLUSION

The decision of the Court below holds that a transaction, ordinarily taxable as a complete transaction of sale by the State of Utah, cannot be taxed because in substance it

constitutes an interstate shipment. The practical effect of this decision is to shift the revenues from such a sale to a foreign state while leaving a taxable incident intact within the State of Utah. At the same time, a tax upon such an incident of sale does not appear to be one which, in form or substance, can be levied by another state in such a manner as to lay an added burden on interstate distribution. This decision opens the door to tax avoidance. It provides an inequitable basis for charging tax on some transactions and to some customers and not on others. It will result in administrative confusion and cause the state to lose revenue to which it is entitled. Petitioner cannot conceive that a state's right to tax should depend upon such considerations.

Petitioner urges that the judgment of the Utah Court should be reversed and that the proposed deficiency assessment against respondent be upheld as a lawful levy upon a series of intrastate transactions.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

STATE TAX COMMISSION OF UTAH, Petitioner

vs.

PACIFIC STATES CAST IRON PIPE COMPANY, a Corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR RESPONDENT

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INDEX

	Page
Opinion Below	2
Statement of Facts	2
The Sales Contracts Here Involved Were Negotiated By Respondent's Out-Of-State Sales Agents	2
Respondent's Products Are Sold For Use By Contractors On Waterworks Or Sewage Jobs Of Governmental Agencies In Accordance With Detailed Engineering Plans and Specifications.	3
The Products Here Involved Were Purchased For Use On Specific Out-Of-State Jobs And Were Of Specific Sizes And Lengths To Conform To The Specifications Covering The Particular Out-Of-State Jobs.	4
All Of Respondent's Sales Of Pipe Are Made On The Basis Of Delivered Prices To The Job Site	4
Respondent Employs Common Carrier (Truck Or Rail), Its Own Truck Or Buyer's Trucks To Effect Delivery.	7
Respondent Pays The Freight In All Cases To The Point Of Delivery And Use Of The Product.	8
Under Respondent's Sales Practices, And The Contractual Documents Relating Thereto, Respondent Is Obligated To Deliver The Material To The Out-Of-State Job Site	9
Respondent's Sales Documents Provide For Passage Of Title F.O.B. Foundry, Regardless Of The Method Of Delivery Employed, Which Is Not Inconsistent With Its Contractual Obligation To Effect A Delivery Of The Material To The Out-Of-State Job Site.	17
All Of The Shipments Here Involved Were Shipped Across The State Line To The Out-Of-State Job Site According To Contract And None Were Diverted To Local Intra-State Use.	20
The Bulk Of The Interstate Sales And Shipments Here Involved On Which Utah As The State Of The Seller Is Attempting To Assess Sales Tax Have Already Been Subjected To Sales Or Use Tax By And In The State Of The Buyer.	20
The States Of Manufacture And Origin Of Respondent's Competitors Do Not Attempt To Levy And Assess Any Such Tax As Here Proposed On Shipments To Out-of-State	

Page

Job Sites And Respondent Would Thereby Suffer A Severe Competitive Disadvantage And Injury 22

Although Respondent's Sales And Contractual Arrangements Are Exactly The Same In The Case Of All Sales, Regardless Of The Method Employed By It To Effect Delivery To The Job Site, Petitioner Has Here Singled Out For Tax Those Sales Delivered By Customer Truck And Left Untouched Those Delivered By Common Carrier, Truck Or Rail, Or By Respondent's Own Trucks 24

The Supreme Court Of Utah Has Here Found As A Matter Of Fact On The Evidence That The Sales Were Interstate Sales And Not Local Sales 25

Statutes And Regulations Involved 26

Questions Presented 31

Summary Of Argument 32

Argument 33

I. The Tax Here Sought To Be Levied By Utah, The State Of The Seller, On The Proceeds Of Interstate Sales, The Bulk Of Which Have Already Been Taxed By The State Of The Buyer, Is Invalid And Unconstitutional Under The Commerce Clause Of The Federal Constitution 33

A. The Decisions Of This Court Prohibit The Seller's State From Taxing The Proceeds Of An Interstate Sale 39

B. The Tax Is Not Made Valid By The Theoretical Possibility Of Diversion To Local Use By Breach Of Contract Of The Purchaser To Haul The Goods Out-Of-State 45

C. Infringement Of The Constitution Cannot Be Justified On Grounds Of Administrative Convenience Or On Theoretical Difficulties Of Securing Proof Of Out-Of-State Destination In Other Types Or Classes Of Cases Not Before The Court 55

D. The Granting Of Commerce Clause Protection To Shipments By Common Carrier Transport From The Seller's State And Denying Such Protection To Shipments By Private Truck Transport Where The Certainty Of Out-Of-State Destination Is Equally Plain, Is Irrational And Repugnant To The Present-day Transportation Needs Of The Nation 59

Page

E. The Sales Here Involved Were Interstate And Not Local Sales, And The Superior Oil, Wood Preserving Corporation And International Harvester Company Cases, Relied On By Petitioner, Are Inapplicable To The Case At Bar ... 72

II. The Tax Here Sought To Be Levied Would Deprive Respondent Of Property Without Due Process Of Law In Violation Of Section 1 Of The Fourteenth Amendment Of The Federal Constitution ... 82

III. The Tax Here Sought To Be Levied Would Deny To Respondent The Equal Protection Of The Laws In Violation Of Section 1 Of The Fourteenth Amendment Of The Federal Constitution ... 84

IV. The Tax Here Sought To Be Levied Is Invalid Under The Provisions Of The Utah Sales Tax Law And The Sales Tax Regulations Issued Thereunder ... 86

Conclusion ... 87

TABLE OF CASES CITED

Adams Manufacturing Company v. Storen, 304 U. S. 307 (1938) ... 38, 39, 41, 42, 43, 48, 79, 82
Adams v. Mississippi Lumber Co., 84 Miss. 23, 36 So. 68 (1904) ... 85
Banker Brothers v. Pennsylvania, 222 U.S. 210 (1911) ... 37
Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission, 266 U.S. 271 (1924) ... 84
Butler Brothers v. McColgan, 315 U.S. 501 (1942) ... 84
Brooks Transport Co., Inc. v. United States, 93 Fed. Sup. 517 (1950) (E.D. Va.) ... 77
Coe v. Errol, 116 U.S. 517 (1886) ... 53
Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917) ... 44
Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 (1921) ... 50
Dept. of Treasury of Indiana v. Wood Preserving Corp., 313 U.S. 62 (1941) ... 73, 74
Edelman v. Boeing Air Transport, 289 U.S. 249 (1933) ... 37
Eureka Pipe Line Co. v. Hallaman, 257 U.S. 265 (1921) ... 49
Freeman v. Hewit, 329 U.S. 249 (1946) ... 39, 41
Globe Varnish Co., 114 F. 916 (1940) (CCA7) ... 47, 53
Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932) ... 37

Page

Gwin, White & Prince, Inc. v. Henneford, 304 U.S. 434 (1939) ... 38, 39, 40, 48
Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926) ... 85
Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931) ... 84
Henneford v. Silas Mason Co., 300 U.S. 577 (1937) ... 37, 38, 81
Heyman v. Hays, 236 U.S. 178 (1915) ... 43
Hughes Bros. Co. v. Minnesota, 272 U.S. 469 (1926) ... 50
International Harvester Co. v. Dept. of Treasury, 332 U.S. 340 (1944) ... 33, 73, 75, 76
Lenoir Chair Co. Cont. Car. App., 51 MCC 65 ... 77
McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940) ... 37, 38, 42, 79, 88
McLeod v. J. E. Dilworth Co., 322 U.S. 327 ... 79
Michigan-Wisconsin Pipe Line Co., 347 U.S. 157 (1954) ... 53
Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934) ... 37
The Pipe Line Cases, 234 U.S. 548 (1914) ... 52
Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928) ... 85
Rearick v. Pennsylvania, 203 U.S. 507 (1906) ... 52
Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946) ... 46
Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923) ... 37
Spalding & Bros. v. Edwards, 262 U.S. 66 (1923) ... 45
Standard Oil Co. v. Johnson, 147 p. 2d 577 (1944) ... 48
Superior Oil Co. v. Mississippi, 280 U.S. 390 (1930) ... 33, 73
Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) 84
United Fuel Gas Co. v. Hallanan, 257 U.S. 277 (1921) ... 49
Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) ... 42
Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949) ... 85
Whitmore Oxygen Co. v. State Tax Comm. 114 Utah 1 (1948) 43, 82
Williams Bros. Corp. Cont. Car. App., 44 Motor Car. Cases (ICC) 557 (Div. 5) (1945) ... 76
Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935) ... 37

Page

STATUTES

The Utah Sales Tax Act, Title 59, Chapter 15, U.C.A. 1953 26

41-11-20, U.C.A. 1953 57
59-15-2, U.C.A. 1953 26
59-15-4, U.C.A. 1953 27
59-15-5, U.C.A. 1953 27
59-15-6, U.C.A. 1953 ..... 28, 57, 86
59-18-10, U.C.A. 1953 58

OTHER AUTHORITIES

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IN THE

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OCTOBER TERM, 1962

NO. 178

STATE TAX COMMISSION OF UTAH, Petitioner

vs.

PACIFIC STATES CAST IRON PIPE COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR RESPONDENT

This case comes to the Court on a writ of certiorari granted October 8, 1962, (R. 100) to review the judgment of the Utah Supreme Court (R. 97) annulling and reversing an order of petitioner assessing a sales tax deficiency against respondent for the period January 1, 1957, to December 31, 1959, with interest, in the amount of $32,290.18 (R.77).

OPINION BELOW

The opinion of the Utah Supreme Court (R.88) is reported in 13 Utah 2d 113, 369 P. 2d 123 (1962).

STATEMENT OF FACTS

Respondent, Pacific States Cast Iron Pipe Company, is a Nevada corporation duly qualified to transact business in the State of Utah (R.25). The company is engaged in the business of manufacturing and selling cast iron pressure pipe, fittings, valves and hydrants. Its plant is located about three miles south of Provo, Utah. The products of the company are sold in thirteen western states, including Hawaii and Alaska (R.25). The cast iron pipe and related items manufactured by the company are sold primarily for use in waterworks and sewage systems (R.45).

Branch sales offices of the company are maintained in Los Angeles and San Francisco, California; Portland, Oregon; and Seattle, Washington. In addition to these sales offices, Waterworks Equipment Company, as respondent's sales agent, maintains sales offices in Great Falls, Montana; Pocatello and Boise, Idaho; and Ogden, Richfield and Salt Lake City, Utah. Dana E. Kepner Company of Denver, Colorado, also acts as respondent's sales agent in the territory comprising the States of Colorado, New Mexico and part of Wyoming (R.25).

The Sales Contracts Here Involved Were Negotiated By Respondent's Out-Of-State Sales Agents.

The sales contracts here involved, subject to home

office approval, were negotiated by respondent's sales agents, Dana E. Kepner Company and Waterworks Equipment Company, at their out-of-state sales offices having sales jurisdiction over the particular territories to which the out-of-state shipments were made (R. 75, 149, 170, 195, 249).

Petitioner's own Finding of Fact (No. 8) in this connection, stated as follows:

> "8. *That the sales in question in most cases were negotiated by representatives of the (respondent) outside of the State of Utah* (R. 75)." (Italics supplied).

Respondent's Products Are Sold For Use To Contractors On Waterworks Or Sewage Jobs Of Governmental Agencies In Accordance With Detailed Engineering Plans And Specifications.

Respondent's products are sold mainly for use on jobs of governmental agencies or units in accordance with detailed engineering plans and specifications covering the particular waterworks or sewage job (R. 26). The jobs are in most cases advertised in a newspaper publicly for the submission of bids by contractors on some specified date following the date of publication (R. 26). Some of the company's business involves sales to real estate subdivisions for water and sewer mains but such sales are likewise made in accordance with detailed engineering plans and specifications and on the basis of sealed bids (R. 26-7).

When a job is advertised or let for bid, respondent's sales agents immediately get in touch with the engineer in charge of the job to ascertain the names of the contractors

who have taken out copies of the plans and specifications or who may be interested in bidding on the job. Respondent makes up a list of the cast iron pipe, valves, fittings and hydrants precisely as set forth in the plans and specifications for the purpose of preparing its bid for such materials to all contractors bidding on the particular job (R.45, 153, 171, 199).

The transactions here in question are typified by Exhibits 4 (R.101), 5 (R.159), 6 (R.179), and 7 (R.206), which include portions of the detailed plans and specifications.

The Products Here Involved Were Purchased For Use On Specific Out-Of-State Jobs And Were Of Specific Sizes And Lengths To Conform To The Specifications Covering The Particular Out-Of-State Jobs.

The petitioner itself found as a matter of fact on the evidence (Finding No. 9) as follows:

> "9. *That the materials so purchased were purchased for use on specific out-of-state jobs and were of specific sizes and lengths to conform to the specifications covering the particular out-of-state jobs* (R.75)." (Italics Supplied).

All Of Respondent's Sales Of Pipe Are Made On The Basis Of Delivered Prices To Job Site.

All prices are figured and quoted to contractors by respondent on the basis of prices of the material delivered to the specific location of the job site where the pipe is to

be used and placed in the ground (R.26, 45). The quotation form of respondent to contractors shows the bid date, identifies the quotation to the specific governmental or other engineering project involved lists in detail the specific items of material and their prices delivered to the job site as shown in the engineering plans and specifications and shows the location of the job site where the material is to be delivered by respondent (R. 45-6, 147, 169, 195, 243). The delivered prices so quoted by respondent include freight at the regular established tariff rates, to job site destination (R. 27, 46).

Historically, in the cast iron pipe industry, for many years, all sales of pipe have been made and priced on the basis of the pipe company delivering the pipe at the point of use of the material. This is because the customer desires it that way. The customer is not interested in pipe at a foundry but in pipe in the specific sizes and lengths required for the job at the particular job site where the pipe is to be installed in the ground (R. 28-9). All prices are quoted by respondent and its competitors on the basis of competitive conditions at the job site (R.29, 30). No jobs are bid or sales made by respondent on the basis of prices delivered to a customer at the foundry; all jobs are bid on the basis of respondent selling and delivering pipe to a specified job site location where the pipe is to be used (R.28-9, 45-6).

Collection remedies and the Robinson-Patman Act have also compelled respondent to adhere strictly and uniformly to a delivered price system (R.29, 30). Practically all customers of respondent pay for the pipe out of the proceeds of the job on which the pipe is used (R.29). To insure collection of its sales accounts, respondent must constantly rely and be in a position in each case to enforce its rights

under the contractor's bond, where the job is a bonded one, or under the mechanic's lien laws of the state where the material is delivered and the job site located (R. 29, 49, 62-3). In connection with each order, the Sales Department is required to secure the name and address of the bonding company, if the job is bonded, or an exact legal description of the real property in which the pipe will be buried in order that a mechanic's lien for the purchase price of the material furnished may be promptly filed and suit instituted for collection (R.63). Each individual job is followed very closely to determine if the contractor has been paid by the owner of the real property or the governmental unit involved and if payment is not forthcoming, the bonding company is immediately notified or legal proceedings for the filing and foreclosure of a mechanic's lien instituted against the property (R.63). Respondent under its established sales practice has never experienced any difficulty in its lien foreclosure proceedings or collection suits against bonding companies, to prove that pipe and related materials were actually delivered by respondent to a particular job (R. 49, 63). If respondent followed some other selling method as, for example, selling pipe to a customer at the foundry without the contractual obligation to deliver to a particular job site, respondent would not be able to utilize the collection remedies available under mechanic's lien laws or under bonds required to be furnished by contractors on jobs where the pipe is actually used (R. 29).

Further, under the Robinson-Patman Act it is believed necessary by respondent to quote all prices on the sale of pipe at the point of delivery and use of the material and never at the foundry for the reason that it would otherwise

run grave risks of being liable for treble damages under that law for having sold to competing customers the same products at different prices (R. 30). Prices are not figured by respondent on the basis of an established foundry price at Provo, Utah, plus freight to destination but are always figured and quoted on the basis of a delivered price, including freight, to the actual job site where the pipe is to be used. Such quoted prices vary from one location to another depending on the competitive conditions respondent faces from its competitors at such points (R. 26, 45-6).

Respondent Employs Common Carrier (Truck Or Rail), Its Own Trucks Or Buyer's Trucks To Effect Delivery

Under the contractual and sales arrangements in effect between respondent and its customers, respondent effects the delivery of its products to the customer at the job site by means of common carrier, truck or rail, or in some cases involving remote or isolated locations, its own trucks, or, in some instances it may employ and pay the customer the regularly established common carrier tariff rate to haul the material to the job site (R. 27, 31, 47). The assessment herein involves and covers only those sales transactions where respondent employed the buyer to transport on respondent's behalf the pipe to the out-of-state job site location (R. 6, 31). Irrespective of which method of delivery is employed, respondent has "the responsibility for delivering the pipe or itself handling all arrangements for the delivery of the pipe and retains exclusive and sole control over such arrangements" because, among other things, respondent's reputation is, in the long run, dependent on getting the pipe to the job site in satisfactory condition (R. 31).

Respondent, in most cases, would not permit the buyer to haul the pipe which he is buying (R. 31). This is only permitted where respondent is reasonably satisfied that the buyer has adequate transportation facilities to effect the delivery and adequate insurance covering the possibility of any damage or loss en route during the interstate haul to the out-of-state job location (R. 31, 68).

Respondent Pays The Freight In All Cases To The Point Of Delivery And Use Of The Product.

All prices quoted by respondent include freight at the regularly established tariff rate to the point of delivery and use at the out-of-state job site (R. 27, 46, 48, 63). Respondent maintains at its Provo offices a list of common carrier truck and rail rates covering most requirements. Rates not there available are secured through respondent's Traffic Department located in Salt Lake City, Utah (R. 46). Respondent is in all cases, regardless of the method of effecting delivery whether by common carrier, its own trucks or customer trucks, responsible for the payment of freight (R. 48). The freight is paid by respondent either by direct payment to the carrier, called prepaid shipments, or by way of an allowance or credit against the delivered prices invoiced to the customer where, as in some cases, the customer may desire to pay the freight or, where, as in the cases here involved, the customer desires and is employed by respondent to haul the material to the out-of-state job site at the established tariff rate (R. 48, 63).

On respondent's invoices, where the freight is prepaid, the invoices so state and the full delivered price, including

freight is billed to the customer. Where freight is allowed, in lieu of a cash payment to the customer, a deduction for the amount of the freight is made by respondent against the agreed delivered prices which include freight to destination, and the net amount billed to and paid by the customer (R. 62-3, 68, 71-2).

Under Respondent's Sales Practices, And The Contractual Documents Relating Thereto, Respondent Is Obligated To Deliver The Material To The Out-Of-State Job Site.

Although the Utah Supreme Court concluded (R. 89) that the "contract called for out-of-state shipment" and that the "bill of lading and contract of sale clearly demonstrated an understanding by both seller and buyer that the pipe was to be shipped to an out-of-state destination," some of the facts and evidence of record on this point will be re-examined here to show that no other conclusion was possible under the circumstances of the case.

Regardless of the specific method of delivery employed by respondent, i.e. whether by common carrier, truck or rail, by customer's truck or by its own trucks, respondent under its established sales, pricing and delivery practices and all of the various contractual documents relating thereto, is definitely obligated both legally and in fact to effect a delivery of the material to the customer at the job site whether out-of-state or in-state.

For example, Mr. E. J. Nelson, General Manager of respondent testified as follows:

"Q. In the case of all sales of the company's products

and especially those here involved, is the company obligated under its contractual arrangements to deliver the material to the job site? (R. 27).

(Then follows the ruling of the Commission, after objection, that such testimony is properly admissable.)

"A. The answer will be that all jobs are bid on the basis of my company selling and delivering the pipe products to the specified job site locations, and delivery by the company to the job site is an essential part of the sale (R. 28)."

Again,

"Q. In your foregoing testimony, you indicated the pricing and selling method followed by the company is a matter of company policy?

"A. Yes, sir, that is correct. In my position as General Manager it is a part of my duty and responsibility to see that all sales of products of my company are always and invariably priced and sold on a delivered basis where the pipe is to be used, and I would emphasize here at the hearing that there is not and cannot be any question that under the contractual arrangements which we enter into with our customers that our company is definitely and clearly obligated to deliver the pipe to the customer at the job site (R. 30)."

Again,

"Q. Mr. Nelson, you are familiar with the transactions that are involved in the proposed sales tax assessment involved here, are you not?

"A. Yes, sir, I am familiar with the assessment and I would state that all of the transactions that are sought to be taxed here involve what our company regards as interstate commerce. That is, all of the sales covered by the assessment reflect shipments across the state line to customers on out-of-state jobs. They involve sales of pipe in the specific quantities and in the specific sizes as required by the plans and specifications of the engineer covering the particular job. All of the sales actually crossed state lines and again I would state unequivocally under oath that my company is obligated to deliver the goods to the out-of-state location in performing its contract to sell such goods.

In other words, the delivery is an integral, necessary and obligatory part of the sales contract . . . (R. 30-1)".

Again, on cross-examination by petitioner's counsel:

"Q. You stated in your testimony that he was obliged to deliver the pipe out-of-state and I wonder what type of a contractual obligation he has to deliver the pipe out of state?

"A. Well, in bidding on a job, we bid on the job delivered at this particular job site and when he uses his own equipment for the delivery, we, of course pay him or allow him for whatever the current rate would be, traffic rate, for the material delivered to the job site.

* * * *

"Q. (By Mr. Howard) When he picks up the pipe at your plant, he signs a bill of lading, is that right?

"A. Right, yes, sir (R. 35-6)."

Again,

"Q. (By Chairman Gunther) Mr. Nelson, exploring this just a little fu her, you indicated earlier in your testimony that on occasion you hire the purchaser to act as your agent to transport goods to the job site?

"A. Yes, sir.

"Q. Now is it our understanding that at the moment you have him sign this bill of lading; that in effect is a contract to him then to act as your agent, you have hired him at that moment?

"A. Yes, sir, to deliver the pipe to this job site (R.36)".

Mr. Glade Anderson, Sales Manager of respondent, testified as follows:

"Q. In effecting the delivery, are bills of lading employed in all classes of delivery?

"A. Yes, sir, they are. We issue a uniform domestic straight bill of lading and this shows our own name as the shipper and it always lists the name of the party who is receiving the pipe and the final destination where it is going.

"Q. And in all of the cases here involved, where the buyer was utilized to effect the delivery to the out-of-state job site, were bills of lading in all cases used by the company and signed by the buyer?

"A. Yes, sir, they were (R. 47-8)."

Mr. O. H. King, Jr., Asst. General Manager of respondent, testified as follows:

"Q. In the cases here involved, Mr. King, where the buyer is utilized to effect the out-of-state delivery, does such a buyer acquire at the foundry an unrestricted right of possession to the material?

"A. Not as far as we are concerned, he does not. He is acting to deliver the material to the specific job for which he and ourselves have entered into a sales and purchase contract (R. 54)."

Again,

"Q. The Commissioner referred to the Page, Arizona, job on which Mr. Clyde was the contractor. In the pipe which went into that particular job, were bills of lading in all instances signed by Mr. Clyde's drivers?

"A. Yes, sir, they were.

"Q. And did those bills of lading show on their face, Page, Arizona, as the destination of the material?

"A. They did.

"Q. And was Mr. Clyde paid the regularly established tariff freight rate for that haul?

"A. Yes, sir, he was (R. 60)."

The contractual documents covering the class of sales transactions included in the assessment were admitted in

evidence as Exhibits 4 to 7, inclusive. They are typical of all the jobs wherein purchasers were employed by respondent at the established freight rate to transport the material to the out-of-state job site (R. 72). Each numbered exhibit consists of (a) the engineering plans and specifications and contractual documents relating to and covering the specific project, (b) copy of respondent's quotation to all contractors bidding on the job, (c) miscellaneous papers or correspondence with respondent's out-of-state sales office relating to the preparation of respondent's bid to be made on the job, (d) bill of lading covering consignment by respondent of material to the out-of-state job site, and (e) respondent's invoice to the customer covering materials shipped to the job. The exhibits cover shipments of material by respondent to the following out-of-state jobs, typical of all the transactions here involved:

Exhibit 4—Platte Canyon Water and Sanitation District, Littleton, Colorado—Specifications for Construction of Steel and Cast Iron Pipelines on South Sheridan Boulevard and Adjoining Streets—July, 1959—Specifications No. 19-201 (R. 101).

Exhibit 5—Pueblo Municipal Sewage Disposal Plant, Pueblo, Colorado—Contract Documents 1957—Furnishing of All Labor, Material and Equipment For and the Construction of Secondary Treatment Structures, Equipment, and Appurtenances, at the Pueblo Sewage Disposal Plant (R. 159).

Exhibit 6—Town of Farmington, New Mexico—Municipal Utilities Improvements-1959-T—Specifications and Contract Documents (R. 179).

Exhibit 7—Access Roads, Streets and Utilities for Page,

Arizona—Glen Canyon Unit, Arizona-Utah, Middle River Division, Colorado River Storage Project—United States Department of The Interior, Bureau of Reclamation—Specifications No. DC-4896 (R. 206).

The engineering plans and specifications, Exs. 4(a) to 7(a), inclusive, set forth the details of the job, its precise location, the specific sizes and lengths of cast iron pipe and number and types of related items needed for the job, specifications of the pipe and how and where the pipe is to be laid in the ground, how the line of pipe is to be tested and inspected after laying, forms of the various contractual documents involved, such as notice to bidders, instructions to bidders, bid bond form, performance bond form, contract, etc. (R. 101, 159, 179, 206).

Respondent's quotations to the contractors bidding on the subject jobs are contained in Exs. 4(b) to 7(b), inclusive. These quotations on their face show the name and out-of-state location of the job, the bid date, and the prices delivered to the job site of the various sizes and lengths of pipe and types of fittings, which list of materials is taken from and tied exactly into the materials listed and shown in the engineer's plans and specifications (R. 46). The prices quoted are shown as delivered prices to the job site, f.o.b. foundry and with full truckload freight allowed to destination. Unloading from truck is the responsibility of the customer (R. 147, 169, 195, 243).

Exs. 4(c) to 7(c), inclusive, show from correspondence of the sales offices that prices are prepared and quoted by respondent on the basis of common carrier truck delivery

to the job site, including freight to destination (R. 150, 171, 198, 250).

Exs. 4(d) to 7(d), inclusive, consist of standard domestic forms of bills of lading employed by respondent in all classes of delivery, including the class of customer truck shipments here involved (R. 48). The bill of lading shows respondent's name as consignor, shows the customer's name as consignee, shows the job site location by town and state under "Destination," uses the word "Called" under "Route," describes the number, sizes, lengths and type of pipe shipped and its weight, and is signed by an agent of respondent as shipper and by the customer's truck driver as agent for the carrier. Under the language of the bill of lading, the customer receives from respondent at Ironton, Utah, "the property described below. . . marked, consigned, and destined as indicated below, which said company . . . agrees to carry to its usual place of delivery at said destination . . ." Each bill of lading has an attached weight tally and on the face of the bill is stamped and written the amount of freight in dollars and cents to be allowed and credited to the customer for the out-of-state haul (R. 154, 174, 201, 259).

Exs. 4(e) to 7(e), inclusive, consist of respondent's invoices for the material sold and delivered to the customer to and for the out-of-state job. The invoices show on their face the name and address of the customer, the name and the out-of-state location of the project to which the material has been shipped and the out-of-state final destination of the material (R. 157, 177, 204, 262). For example, Ex. 4(e) (R. 157), which is typical, shows:

"SOLD TO Warner Brothers Company
5505 Vance St.
Arvada, Colorado

"SHIP TO Same: Platte Canyon Water &
Sanitation District
Littleton, Colorado

"FINAL DESTINATION LITTLETON, COLO
"TERMS 30 DAYS NET
"ROUTE CALLED
"F.O.B. FOUNDRY FRT. ALLOWED AT
17.20 N.T.

The description and quantity ordered are shown in the first column, next the quantity shipped in pieces and feet, next the unit price, and next the total price delivered to the job. Freight payment to the customer and collection of Colorado Sales and Use Tax are handled as follows:

	AMOUNT
	2441.58
	2441.58
LESS FRT. ON 33651 LBS.	289.40
	2152.18
2% COLO. TAX	43.04
	2195.22

Respondent's Sales Documents Provide For Passage Of Title F.O.B. Foundry, Regardless Of The Method Of Delivery Employed, Which Is Not Inconsistent With Its Contractual

Obligation To Effect A Delivery Of The Material To The Out-Of-State Job Site.

Respondent's standard form of quotation to all contractors bidding on a specific out-of-state job will normally provide that the prices quoted are f.o.b. foundry with full freight allowed to destination. For example, the quotation on the Platte Canyon Water and Sanitation District job at Littleton, Colorado (R. 148), provides:

> "The prices quoted herein are f.o.b. our foundry at Ironton, (Provo), Utah with full present 35,000 lbs. truckload freight allowed to Littleton, Colorado; therefore these are delivered prices."

Whether the provisions attempting to pass technical legal title to the customer f.o.b. foundry are fully effective in all cases is debatable (R. 21-2, 50). The provisions are inserted for the purpose of putting respondent in a little better position in the event of damage to the material in transit and to help insure more careful unloading and handling of the pipe by the customer alongside trenchsite at the out-of-state point of destination (R. 50). Irrespective of the question upon whom lies the technical "responsibility" for filing a claim for any damage in transit against the common carrier or insurance company, respondent, and not the customer, in practice and in fact handles through its traffic department practically all claims for loss or damage during interstate transit of the material (R. 39, 50).

Respondent retains exclusive control over all shipping arrangements and will not permit a customer to haul material to a job site unless satisfied he has adequate transport

facilities and insurance covering any damage to the material in transit (R. 31).

Mr. Nelson testified:

> "Also, I would point out that we do not and would not in most cases permit the buyer to haul the pipe which he is buying. We only permit this where we are reasonably satisfied that he has adequate transportation facilities to effect the delivery and adequate insurance covering the possibility of any damages or loss en route during the interstate haul to the out-of-state job location (R. 31)."

Mr. W. W. Clyde, of W. W. Clyde Construction Company, contractor on the Page, Arizona job (R. 206), for example, testified that he requested permission from Mr. Nelson, respondent's General Manager, to transport the pipe down to the job at Page, Arizona, on his transports for the established tariff of $22.40 per ton (R. 68). He desired to do this to help offset a $6.00 increase in the price of the pipe made necessary under an escalator clause in respondent's quotation increasing the price in the event of an increase in the price of pig iron (R. 249). Mr. Clyde had adequate insurance to cover any losses or damages to the pipe in transit to Page, Arizona (R. 70). Mr. Clyde's impression of the transaction, from a practical business standpoint, was that the prices quoted by plaintiff being delivered prices, prices were all f.o.b. Page, Arizona (R. 67-69). He testified that some of the materials went to the Page job by truck common carrier (R. 68-9). The material which he hauled was all transported to the Page, Arizona job site under uniform bills of lading signed by his truck drivers as agent (R. 71). He was paid $22.40 per ton freight for the

haul which was paid to him by respondent not in cash but by way of credits against the delivered prices to Page, Arizona (R. 60, 68, 72).

All Of The Shipments Here Involved Were Shipped Across The State Line To The Out-Of-State Job Site According To Contract And None Were Diverted To Local Intra-State Use.

All of the sales here involved were actually and in fact delivered according to contract across the state line to the out-of-state job sites (R. 54). Mr. O. H. King, Jr. testified:

"Q. Were there any instances that are involved here of sales that were not shipped and delivered to the out-of-state job sites in accordance with the contracts?

"A. All instances here under discussion were consummated as contracted (R. 54)."

None of the contracts of sale here involved requiring for their performance the out-of-state delivery to job site of the material being purchased were violated or breached and the material diverted to local intra-state use by the customer or for sale or use by the customer on any other job other than the one for which the material was specifically purchased by the customer (R. 31, 48, 54). Respondent has been legally advised that it has adequate legal remedies against a customer to prevent any breach of contract under which the customer might attempt to divert the property to local intra-state use (R. 32).

The Bulk Of The Interstate Sales And Shipments Here Involved On Which Utah As The State Of The Seller Is

Attempting To Assess Sales Tax Have Already Been Subjected To Sales Or Use Tax By And In The State Of The Buyer.

Although respondent's products are sold in the thirteen western states, including Hawaii and Alaska, the interstate shipments by customer truck here involved were confined to the intermountain states of Colorado, Arizona, Wyoming and New Mexico, and others to a less substantial extent (Idaho and Montana) (R. 64-5).

In the State of Colorado respondent is qualified to do business and is qualified and required to collect and remit Colorado sales and use tax on all shipments of pipe material into the State of Colorado irrespective of the particular method employed by respondent to effect delivery (R. 64).

The Colorado sales on which respondent has already collected tax from the customer and remitted the same to the Colorado Bureau of Revenue constitute 32.3 per cent of the total sales transactions which petitioner is here seeking to tax again (R. 64).

The States of Arizona, Wyoming and New Mexico each have a sales and use tax law, but in view of the fact that respondent during the period here involved was not qualified to do business or assess and collect sales and use tax in those states, the customers were required to and paid use tax on the shipments here involved into such states (R. 64-67).

The sales to Arizona, Wyoming and New Mexico on which the customer paid tax to such states constitute 36.6

per cent of the total sales transactions which petitioner is here seeking to tax again (R. 64).

68.9 per cent of the total interstate sales here involved have thus been already taxed by the states of destination (R. 64).

The balance of the sales to other states (that is, to Idaho and Montana) have not been taxed because those states presently have no sales or use tax law (R. 64). Respondent is, however, informed that these states "will soon adopt a sales and use tax," a sales and use tax law having actually been passed in the last legislative session in Idaho, but killed by veto (R. 65).

The States Of Manufacture And Origin Of Respondent's Competitors Do Not Attempt to Levy And Assess Any Such Tax As Here Proposed On Shipments To Out-Of-State Job Sites And Respondent Would Thereby Suffer A Severe Competitive Disadvantage And Injury.

All sales of cast iron pipe are made and priced on the basis of the pipe company delivering the pipe at the point of use and delivery of the material (R. 26, 45). The price of pipe thus varies from one location to another depending on the competitive conditions at the point of use (R. 26, 45).

The position of respondent in the cast iron pipe industry with respect to sales is very small (R. 33). The giant of the industry is United States Pipe and Foundry Company with, among others, a plant located at Decoto, California (R. 33). Respondent is subjected to intense competition from this point (R. 34). It also faces strong competition

from pipe manufactured in Birmingham, Alabama, and Council Bluffs, Iowa, among other places (R. 26). Freight is a significant and substantial portion of the delivered prices quoted to customers (R. 34).

Cast iron pipe is purchased regularly in all areas served by respondent and based upon past experience and accumulated tabulations of bids, respondent can guess within fairly close limits what its competitors may bid at any particular point (R. 49). Over ninety per cent of all respondent's sales are sold under bids on jobs where the price spread is less than the 2 per cent Utah Sales Tax (R. 49). Respondent's competitors do not have to pay a sales tax on pipe sold and shipped from place of manufacture to out-of state jobs and a 2 per cent Utah sales tax on respondent's out-of-state shipments as here proposed would automatically place respondent at a 2 per cent competitive disadvantage with its competitors shipping from Iowa, California, Alabama or elsewhere whether or not the state of destination has or has not a sales and use tax law (R. 51-2).

For example, Mr. W. W. Clyde testified with respect to the Page, Arizona, job as follows:

"Q. In making your bid to the government, you used the prices that were quoted to you by Pacific States?

"A. Yes, sir.

"Q. Did you, in making your estimate, include any amount therein for Utah Sales tax?

"A. We did not. We included the taxes of Arizona.

"Q. But not Utah sales tax?

"A. Not Utah (R. 67."

Although Respondent's Sales And Contractual Arrangements Are Exactly The Same In The Case Of All Sales, Regardless Of The Method Employed By It To Effect Delivery To The Job Site, Petitioner Has Here Singled Out For Tax Those Sales Delivered By Customer' Truck And Left Untouched Those Delivered By Common Carrier, Truck Or Rail, Or By Respondent's Own Trucks.

As heretofore indicated, all sales of respondent's products are shipped either (1) by common carrier, truck or rail, (2) by respondent's own equipment, or (3) by the buyer who is hired to haul the material. There is, however, no distinction whatever in respondent's contractual arrangements or documents between these three types of delivery to the job site (R. 47). The quotation forms are the same, the invoice forms are the same and the uniform domestic straight bill of lading forms are the same, irrespective of the method of delivery (R. 47-8).

Mr. Glade Anderson testified:

"Q. And is there any distinction in these contractual documents that you normally employ in your operations among these several classes?

"A. No sir, there isn't (R. 47."

Petitioner, however, here proposes to tax only those sales where shipments were effected by customer truck (R.

6, 12, 31, 72).

The Supreme Court Of Utah Has Here Found As A Matter Of Fact On The Evidence That The Sales Were Interstate Sales And Not Local Sales.

The Utah Supreme Court concluded on the evidence (R. 88), that:

(1) If the pipe had been delivered to a common carrier to an out-of-state purchaser, the sale would not have been taxable in Utah.

(2) Delivery was taken in Utah by the out-of-state purchaser in his own equipment, actually transported from the pipe company's foundry directly, and without interruption, to the out-of-state destination called for by the contract and bill of lading.

(3) The contract called for out-of-state shipment, and the pipe company set the destination price which included the common carrier freight charge between the two points.

(4) Such tariff was credited to the purchaser.

(5) The bill of lading and contract of sale clearly demonstrated an understanding by both seller and buyer that the pipe was to be shipped to an out-of-state destination.

(6) Under such contract, bills of lading and the highly detailed engineering specifications, it was quite improbable, if not almost impossible, to conclude other than that the

goods could not be diverted to any other or intrastate consumption.

(7) There was no contractual or transportational format designed to deceive anyone or to evade taxation.

(8) There was a certainty of interstate shipment.

(9) The goods all actually reached their consigned destination and none were diverted to a local use.

(10) If the goods had been diverted to local use, the most that could be said is that there would have been a contractual breach respondable in damages, and perhaps reflecting a circumstance justifying the imposition of a Utah sales tax on an intrastate transaction.

STATUTES AND REGULATIONS INVOLVED

The Utah Sales Tax Act, Title 59, Chapter 15, U.C.A. 1953, provides in part as follows:

"59-15-2

(b) The term "sale" or "sales" includes installment and credit sales, and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale and also includes the sale of electrical energy, gas, services or entertainment taxable under the terms of this act. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale.

(e) The term "Retailer" means a person doing a

regularly organized retail business in tangible personal property, known to the public as such and selling to the user or consumer and not for resale, and includes commission merchants and all persons regularly engaged in the business of selling to users or consumers within the state of Utah; but the term "retailer" does not include farmers, gardeners, stockmen, poultrymen or other growers or agricultural producers, except those who are regularly engaged in the business of buying or selling for a profit. The term "retail sale" means every sale within the state of Utah by a retailer or wholesaler to a user or consumer, except such sales as are defined as wholesale sales or otherwise exempted by the terms of this act. . ."

"59-15-4. Excise tax—Rate. From and after the effective date of this act there is levied and there shall be collected and paid:

(a) A tax upon every retail sale of tangible personal property made within the state of Utah equivalent to two per cent of the purchase price paid or charged, or in the case of retail sales involving the exchange of property, equivalent to two per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, provided, however, that the sale of coal, fuel oil and other fuels shall not be subject to the tax except as hereinafter provided."

"59-15-5. Every person receiving any payment or consideration upon a sale of property or service subject to the tax under the provisions of this act, or to whom such payment or consideration is payable (hereinafter called the vendor) shall be responsible for the collection of the amount of the tax imposed on said sale; provided, however, that where any sale of tangible per-

sonal property is made by a wholesaler to a retailer, upon the representation by the said retailer that the said personal property is purchased by the said retailer for resale, and the said personal property thereafter is not resold, the wholesaler shall not be responsible for the collection or payment of the tax imposed on the said sale, but the said retailer shall be solely liable for the said tax. The vendor shall collect the tax from the vendee, but in no case shall he collect as tax an amount (without regard to fractional parts of one cent) in excess of the tax computed at the rates prescribed by this act, . . ."

"59-15-6. Exempt Sales. — . . . ; and all sales which the state of Utah is prohibited from taxing under the Constitution or laws of the United States, or of the state of Utah shall be exempt from taxation under this act."

The Utah Sales Tax Regulations provide in part as follows:

"2. Nature of Tax (Applies to sales tax only). — This is a transaction tax imposed upon certain retail sales of tangible personal property made within the State of Utah; . . . . The tax is not upon the articles sold or furnished, but upon the transaction, and the purchaser is the actual taxpayer. The vendor is charged with the duty of collecting the tax from the purchaser and of paying the tax to the state."

"4. Collection of tax (Applies to sales tax only). — The vendor is required to collect the tax from the vendee with respect to all taxable transactions. The tax must be added to the sales price and collected or charged as a separate item. The vendor is required to remit to the tax commission all tax funds in his posses

sion and is a guarantor of all amounts required to be collected under this act.

"31. Time and place of sale (Applies to sales and use taxes). Ordinarily, the time and place of a sale are determined by the time and place that the contract of sale is made between the seller and the buyer. However, in all cases the intent of the parties is the governing factor in determining both time and place of sale and is subject to the general law of contracts. If the contract of sale requires the seller to deliver the goods to the buyer or at a particular place or to pay the freight or cost of transportation to the buyer or to a particular place, title to the property does not pass until the goods have been so delivered to the buyer or have reached the place agreed upon. Delivery to a common carrier by the seller for the purpose of transmission to the buyer outside the state of Utah shall be deemed a sale in interstate commerce for the purposes of the sales tax act and such sales shall not be subject to the tax."

"44. Sales in interstate commerce (Applies to sales tax only). Sales made in interstate commerce are not subject to the sales tax imposed by the act. However, the mere fact that commodities purchased in Utah are transported beyond its boundaries is not enough to constitute the transaction of a sale in interstate commerce. Where the commodity is delivered to the buyer in this state even though the buyer is not a resident of the state and intends to transport the property to a point outside the state, the sale is not in interstate commerce and is subject to tax.

"In determining whether a sale is made in interstate commerce certain general principles will apply. Interstate commerce is not recognized unless there is a movement of a subject of commerce from a point

within the territorial jurisdiction of one state across the boundary line to a point within the territorial jurisdiction of another. Each of the following three rules must be complied with to constitute interstate commerce:

1. *The transaction must involve actual and physical movement of the property sold across the state line.*

2. *Such movement must be essential and not an incidental part of the sale.*

3. *The seller must be obligated by the express or unavoidable implied terms of the sale or contract to sell to make physical delivery of the property which forms the subject matter of the transaction across a state boundary line to the buyer.*

"When tangible personal property is located within the state of Utah at the time of sale and is delivered within the state of Utah such sale is taxable irrespective of where the parties to the contract of sale are located and where the contract was made or accepted or the funds paid. Where tangible personal property is located within the state of Utah at the time of sale, but delivery of the article sold is made at a destination outside Utah and where the seller of the article retains actual physical possession of the article after sale either in person or through an agent until such property is delivered to the purchaser at a destination beyond the boundary of this state such sale shall be deemed to have been made in interstate commerce and exempt from Utah tax.

"Where delivery is made by the seller to a common carrier for transportation to the buyer outside the state of Utah, the common carrier shall be deemed to be

the agent of the vendor for the purposes of this section regardless of who is responsible for the payment of the freight charges.

"If property is ordered for delivery in Utah from a person or corporation doing business in Utah the sale is taxable even though the merchandise may be shipped from outside the state to the seller or direct to the buyer."

QUESTIONS PRESENTED

The primary question presented here is whether Utah, the state of the seller, can impose a sales tax on the proceeds of interstate sales (the bulk of which have already been subjected to sales or use tax by the state of the buyer) under the commerce clause of the Federal Constitution (Art. I, Sec. 8).

Also involved, raised and argued below were the questions whether such tax denies to respondent the equal protection of the laws and deprives respondent of property without due process of law, all in violation of Section I of the Fourteenth Amendment of the Federal Constitution, together with the question whether the transactions are in any event, exempt under the technical definition of interstate commerce in the Utah Sales Tax Regulations.

In the event of the affirmance by this Court of the decision below based upon the commerce clause question, it would be unnecessary to decide the other questions. However, in the event the Utah Court's decision is reversed, it would then become necessary to remand the case for an adjudication of the other questions.

Although the decision below *"under the facts of this case"* (R. 88), on the commerce clause, was clearly correct, it is equally apparent that the tax is also invalid (1) under the due process clause for not apportioning some of the sales receipts to the out-of-state sales activities of respondent's sales agents, (2) under the equal protection clause for irrational and discriminatory classifications between different, but equally certain, means of interstate transport, and (3) under the technical Utah definitional administrative Regulations of interstate commerce, whether such Regulations actually conform to the decisions of this Court or not.

SUMMARY OF ARGUMENT

I.

The tax here sought to be levied by Utah, the state of the seller, on the proceeds of interstate sales, the bulk of which have already been taxed by the state of the buyer, is invalid and unconstitutional under the commerce clause of the Federal Constitution.

A. The decisions of this Court prohibit the seller's state from taxing the proceeds of an interstate sale.

B. The tax is not made valid by the theoretical possibility of diversion to local use by breach of contract of the purchaser to haul the goods out-of-state.

C. Infringement of the Constitution cannot be justified on grounds of administrative convenience or on theoretical difficulties of securing proof of out-of-state destination in other types or classes of cases not before the Court.

D. The granting of commerce clause protection to shipments by common carrier transport from the seller's state but denying such protection to shipments by private truck transport where the certainty of out-of-state destination is equally plain, is irrational and repugnant to the present-day transportation needs of the nation.

E. The sales here involved were interstate and not local sales, and the *Superior Oil, Wood Preserving Corporation* and *International Harvester Company* cases, relied on by petitioner, are inapplicable to the case at bar.

II.

The tax here sought to be levied would deprive respondent of property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Federal Constitution.

III.

The tax here sought to be levied would deny to respondent the equal protection of the laws in violation of Section I of the Fourteenth Amendment of the Federal Constitution.

IV.

The tax here sought to be levied is invalid under the provisions of the Utah Sales Tax Law and the Sales Tax Regulations issued thereunder.

ARGUMENT

I.

The Tax Here Sought To Be Levied By Utah, The State Of

The Seller, On The Proceeds Of Interstate Sales, The Bulk Of Which Have Already Been Taxed By The State Of The Buyer, Is Invalid And Unconstitutional Under The Commerce Clause Of The Federal Constitution.

Utah, the state of the seller, is here attempting to tax the gross receipts, without apportionment, from interstate sales of cast iron pipe into specific out-of-state governmental sewage and waterworks jobs where under exactly the same set of contractual documents, the respondent as seller paid the customer, instead of a common carrier, the established tariff rate to haul the pipe to the out-of-state job sites. A decision in favor of the state would have restricted the protection of the Federal commerce clause to common carrier shipments even though in both classes of shipment title passed f.o.b. foundry and in neither class were there any diversions to local intra-state or other use by purchaser's breach of contract. In both classes of transactions, the manifest certainty of shipment to out-of-state job site destination was equally plain.

The present case is special and unique. It was decided by the Utah Supreme Court strictly on the basis of the facts. The facts here are important and petitioner's case is haunted by the facts, including its own findings. *The petitioner itself found that the sales in most cases were negotiated by respondent's sales representatives outside the State of Utah, and that the materials so purchased were purchased for use in specific sizes and lengths to conform to the specifications covering the particular out-of-state jobs.* (Findings 8 and 9, R. 75). We do not read petitioner's brief as seeking to impeach its own findings.

The findings of petitioner need very little, if any, supplementation to show the clear and obvious interstate commerce character of the transactions.

The Supreme Court of Utah, however, did supplement these findings on undisputable evidence by holding that the sales were interstate sales at delivered prices, including freight, to the out-of-state job site locations, that the seller paid freight to the customer for the interstate haul under the contract and bill of lading to the job site by crediting the tariff to the purchaser, that the understanding and agreement of the parties required an out-of-state shipment of pipe to destination, that all of the goods reached their consigned out-of-state destinations and none were diverted to local or other use, that the contractual format was not designed to evade taxation, and that there was a certainty of interstate shipment.

It is a fact here that respondent maintained at all times complete control and responsibility over the selection of the means of transport to the out-of-state job site, whether by its own trucks or by common carrier or by customer truck. Pipe is paid for out of the proceeds of the job. For credit and collection purposes, respondent has 'to stay on top of the job every minute' and literally 'follow the pipe right into the ground' in every transaction. Cast iron pipe is heavy and expensive. Freight is a significant portion of the delivered price. All pipe is sold at a delivered price to the job-site, including freight. It is not sold at prices f.o.b. plant plus freight. Each job is a special sale. The pipe is sold on every job, big or small, for burial into a specifically known, engineered and identified job site location.

These are the facts of the case. When, in the face of these facts, petitioner attempts to argue the sales were fully consummated locally, it is arguing the facts not of this case but of some other case.

Nor can there be the slightest question that the tax here is sought to be imposed on the proceeds of these interstate sales. There is no dispute here that for the taxable period involved, petitioner's sales tax auditor went through all of respondent's sales invoices for the period and singled out for tax the sales receipts of those interstate sales which went by customer truck. The fact that all of the receipts on the same invoices had (with the exception of Idaho and Montana) already been taxed in the states of the buyer was regarded as immaterial.

There is infringement of the Congressional power to regulate commerce among the several states under the decisions of this Court where the state of the seller imposes a direct tax, without apportionment, on the gross proceeds of an interstate sale.

The right of the state of the buyer to impose a sales or use tax on such proceeds has long since been settled.*

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*Sales Taxes: Banker Brothers v. Pennsylvania, 222 U.S. (1911);
Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923);
Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935);
McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940).

Use Taxes: Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932);
Edelman v. Boeing Air Transport, 289 U.S. 249 (1933);
Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934);
Henneford v. Silas Mason Co., 300 U.S. 577 (1937).

Permitting the state of manufacture to also tax the sales proceeds would obviously subject the interstate sale to discrimination. The sale would be burdened with two taxes if the state of market has a tax and one tax if it does not. In either event, interstate sales would be subjected to an extra tax not borne by local sales.

The state of destination or market has been given this priority over the state of origin or manufacture by reason of the nature of the tax. Sales and complementary use taxes are basically taxes on final use and consumption. Sales for resale are exempt. The tax is on the consumer. The consumer being in the state of market, it is only logical that the state of the market in which the final use and consumption is protected and takes place should levy the tax. The decisions point out that the state of manufacture through other long recognized forms of taxation (such as excise, property, income, franchise taxes, etc.) has ample and constitutionally legitimate means at its disposal to tax the manufacturing company without resort to a direct tribute on the proceeds of interstate sales. The state of the market can claim the tax on the basis of economic use and consumption of the goods within its jurisdiction. The state of the seller can point only to its desire for more tax revenue.

By every standard of fairness, Constitutional necessity and common sense, the state to which the material is shipped for final use and consumption is the appropriate locus of taxation on the consumer of such material. One of the very fundamental purposes of the commerce clause was to prevent a levy by one State on the consumers in another State. As stated in the Federalist, No. XLII:

> "A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumer of the former."

The lack of such a protective provision in the Articles of Confederation constituted a basic defect of government clearly demonstrated by experience. This is the underlying and implicit ground of the distinction, as shown hereafter, between the *Henneford* and *Berwind-White* cases on the one hand and the *Adams Mfg.* and *Gwin, White & Prince* cases on the other. All of the states have grown accustomed to this distinction. The distinction represents no mere poetical image or metaphysical abstraction. On its preservation rests the common free-trade market economy of the United States.

In the case at bar, the petitioner seeks to avoid the clear force of the constitutional prohibition by attempting to argue here that interstate commerce is local commerce. It asks this Court to determine in effect that there can be no such thing as interstate commerce unless the property moves across the state line to market by *common carrier, truck or rail.*

In the early days of this republic when there was no such thing as a pipeline, a railroad, or an airline or a truck, such a view of the commerce clause would have been sheer fantasy. The founding fathers never intended the com-

merce clause to be restricted to any particular mode of transportation. Nor can petitioner point to even one decision of this Court since the beginning of the republic to support its ill-advised attempt here to restrict the constitutional protection of interstate commerce to truck and rail common carrier transport.

A.

The Decisions Of This Court Prohibit The Seller's State From Taxing The Proceeds Of An Interstate Sale.

Adams Manufacturing Company v. Storen, 304 U.S. 307 (1938), *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939) and *Freeman v. Hewit*, 329 U.S. 294 (1946), settled the proposition that the state of the seller cannot under the Federal commerce clause tax the unapportioned gross proceeds of an interstate sale.

In the *Adams Manufacturing* case it appeared that the taxpayer, an Indiana corporation, was engaged in the business of manufacturing road machinery and equipment. Its home office, principal place of business and factory were in Indiana. Eighty percent of its products were sold to customers in other states upon orders taken subject to approval at the home office.

The Supreme Court held that Indiana could not under the commerce clause tax the gross receipts from such interstate sales. The opinion states:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities

in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Sec. 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce."

In the *Gwin, White & Prince* case, the Court held that a Washington tax measured by the gross receipts of the taxpayer from its business of marketing fruit, as agent for a fruit growers' cooperative organization, shipped from Washington to customers or places of sale in various states and foreign countries was prohibited by the commerce clause of the Federal Constitution. The Court stated:

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."

Freeman v. Hewit, 329 U.S. 294 (1946), the most recent case on the question, involved the attempt by Indiana, the state of the seller, to tax the gross receipts of an Indiana seller from an interstate sale of securities. Here an Indiana trustee instructed his Indiana broker to sell certain securities. The securities were sold through the Indiana broker's New York broker correspondent on the New York Stock Exchange. Upon sale the trustee delivered the securities to the Indiana broker for mailing to New York. The proceeds of sale, after deducting expenses and commission, were remitted by the New York broker to the Indiana broker and in turn to the trustee. There being no distinction under the Indiana tax law between the sale of tangible as distinguished from intangible property, the tax was struck down by the Court under the authority of the *Adams Manufacturing* case. The Court stated:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause.
>
> "This case, like *Adams Mfg. v. Storen*, supra, involves a tax imposed by the state of the seller on the proceeds of interstate sales. To extract a fair tithe from interstate commerce for the local protection afforded to it, a seller state need not impose the kind of tax which Indiana here levied. As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale.

* * * * * *

"It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transaction. *If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable.* But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment."
(Italics supplied).

The decision holds that the force and rationale of the *Adams Manufacturing* case had not been impinged upon by *McGoldrick v. Berwind-White Co.*, supra, upholding the right of the buyer's state to impose a sales tax upon the delivery for final consumption within the buyer's state.

In *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the Court upheld a New Mexico tax on the gross receipts from advertising in a journal whose circulation was partly interstate upon grounds which included the fact that the tax could not be duplicated in another state. The Court stated:

"The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. As already noted, receipts from subscriptions are not included in the measure of the tax . . . The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent."

The Supreme Court of Utah in *Whitmore Oxygen Co. v. State Tax Comm.*, 114 Utah 1 (1948), involving the applicability of the Utah Use Tax to purchases of cylinders shipped by a seller from Indiana to a Utah buyer, has correctly recognized the *Adams Manufacturing* case as constitutionally precluding the state of the seller from taxing the gross receipts of an interstate sale. The Utah Court stated:

> "Plaintiff contends that as an Indiana sale, the transaction would be subject to taxation under the Indiana Gross Income Tax Act of 1933, which is said to be a general sales tax act. However, in the case of *J. D. Adams Mfg. Co. v. Storen* . . . . . , the United States Supreme Court held the Indiana Gross Income Tax Act of 1933, as applied to the gross receipts of corporations whose income is largely derived from sales to customers in other states and foreign countries was unconstitutional.
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> "We have before us a sale in Indiana to a customer in Utah. The sale is, then, one which the Supreme Court of the United States has said may not be taxed by the State of Indiana, under the Indiana Gross Income Tax Act of 1933. . . ."

The *Adams Manufacturing* rule is in strict accord with other precedent involving both the commerce and export clauses of the Constitution. For example, *Heyman v. Hays*, 236 U.S. 178 (1915), held that Tennessee was precluded under the commerce clause from imposing a privilege tax on a wholesale liquor business confined exclusively to filling mail orders and shipping goods to customers outside the state. The state argued that the sales were completed in

Tennessee because the carrier to whom the goods were delivered for shipment 'was the agent of the buyer'. . ." The Court replied:

> "But this is immaterial since it is not open to controversy that substance and not form controls in determining whether a particular transaction is one of interstate commerce and hence *the mere method of delivery is a negligible circumstance* if in substantial effect, the transaction under the facts of a given case is interstate commerce." (Italics supplied).

Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917), held that Pennsylvania was precluded from levying a tax on the gross receipts of a Pennsylvania seller from sales and shipments to customers in foreign countries. The Court stated:

> "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms.
>
> ". . . the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and, for the same reason, to be in effect an impost or duty on exports . . . . . (citing cases)

"Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned."

From the foregoing cases, it is thus clear beyond doubt that the present tax being imposed by the state of the seller on the full gross receipts from interstate sales is invalid and unconstitutional even if it had not been established by the evidence here that the bulk (68.9%) of the sales receipts have in fact already been taxed in the buyer's state.

B.

The Tax Is Not Made Valid By The Theoretical Possibility Of Diversion To Local Use By Breach Of Contract Of The Purchaser To Haul The Goods Out-Of-State.

There remains the question whether the firm constitutional prohibition against the taxation of the gross receipts of an interstate sale by the seller's state is changed in any way by the mere fact that out-of-state delivery is effected by customer truck at respondent's expense rather than by common carrier or that the buyer might theoretically breach his contract to haul to the out-of-state job site and divert the property to local intrastate use. The cases make it plain that the constitutional protection of the commerce clause cannot be restricted to common carrier or any other particular means of transport, nor can the theoretical possibility of diversion to local use be permitted to evade the constitutional prohibition.

In *Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923), a tax on baseball bats and balls sold to Scholtz & Co., com-

mission merchants, for a foreign consignee and for the sole purpose of export, title passing on delivery to the carrier, was held invalid under the export clause. The Court stated:

> "Neither does it matter that the title was in Schlotz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co. was solely for the purpose of Delgado & Cia. and for their account and risk: *Theoretical possibilities may be left out of account.*" (Italics supplied).

Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946), involved the validity of the California sales tax as applied to sales of oil to the New Zealand government, f.o.b. Los Angeles, payment in London, with delivery into the purchaser's steamer by pumping from storage tanks of seller located at the harbor. A bill of lading designated seller as shipper and buyer's agent in Aukland, New Zealand, as consignee.

The California Supreme Court, one justice dissenting, first ruled the tax unconstitutional. After rehearing it reversed its position and held the tax constitutional, two justices dissenting, on the ground that title passed to the purchaser upon delivery of the oil into its vessel and prior to the commencement of exportation. The Court indicated the oil might have been diverted to local use and that the result would have been otherwise if the delivery had been to a common carrier. Thus was presented the precise question here involved.

This Court reversed the California court and held the tax unconstitutional. The opinion states:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendors' tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and *there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use.* It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. *The means of shipment are unimportant, so long as the certainty of the foreign destination is plain.*" (Italics supplied).

To the same effect is *In Re Globe Varnish Co.*, 114 F. 2d 916 (1940) (CCA7), a commerce clause case, where a railroad with offices and freight station in Chicago ordered paint from an Illinois seller for use at its shops in Milwaukee, Wisconsin, the paint being delivered at $1.10 per gallon, f.o.b. Chicago to the buyer at its Chicago station consigned by the seller under a standard bill of lading to the buyer over the buyer's railroad to its Milwaukee shops.

The Circuit Court held the Illinois tax on the sales invalid under the commerce clause stating that under the *Adams Mfg. Co.*, *Western Live Stock* and *Gwin, White & Prince* cases, imposition of a tax by Illinois, the state of the seller, on the proceeds of sale would have subjected the sale to the risk of another tax burden in Wisconsin. The Court stated:

> "Moreover, complete title presupposes free use, control and possession by the owner or his agent, hence the Railroad's title to this property was not untrammeled as between it and the seller until the delivery was made in Milwaukee.
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> * * * * *
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> ". . . . However, as Wisconsin has the right to levy a compensating use tax on property such as here involved, Illinois, aside from the exemption, cannot validly levy a privilege tax measured by the proceeds of the sale, as this would result in two taxes upon an interstate sale, while a local sale would be subject to only one."

The Supreme Court of California in *Standard Oil Co. v. Johnson*, 147 P. 2d 577 (1944), arrived at the same result but mainly on due process grounds in a case involving California sales tax on sales of fuel oil by a California seller to the Southern Pacific Company for use on its railroad in Oregon, Nevada, Arizona and Utah. The oil was loaded into tank cars of the buyer in California and transported over the buyer's railroad, freight prepaid, under standard bills of lading showing the seller as consignor and the railroad buyer as consignee. The oil was ordered "f.o.b. points of destination as indicated in said bills of lading." The Court stated:

"We cannot hold as a matter of law, however, that regardless of the intent and conduct of the parties a taxable sale took place in California rather than in another jurisdiction because of the one circumstance that the parties did not select a carrier other than the railroad of the buyer."

The possibility of diversion to local use was held in *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265 (1921), not to justify a West Virginia tax of 2 cents for each barrel of oil transported through plaintiff's pipe line where in fact the bulk of the oil actually moved out of state. The tax was admitted to be properly levied only with respect to the barrels actually diverted to local intrastate use. The Court stated:

"No bailor has title to any specific oil, and to deny the character of interstate commerce to the whole stream simply because some one might have called for a delivery that probably would have been made from it in an event that did not happen, is going too far."

Again, in *United Fuel Gas Co. v. Hallanan*, 257 U.S. 277 (1921), a case very similar with the case at bar, the Court held the same West Virginia tax statute as applied to gas invalid under the commerce clause *where the purchaser purchased gas in West Virginia and transported the gas through the purchaser's pipe line to points outside the state*. The portion actually diverted to local use was relatively small. The Court stated:

"Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers after they receive it might change their minds before the gas leaves the

> State and that the precise proportions between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events marks the carriage of the greater part as commerce among the States and *theoretical possibilities may be left out of account.*" (Italics supplied).

See also the case of *Dahnk-Walker Co. v. Bondurant*, 257 U.S. 282 (1921), (not a tax case), where the Court stated:

> "The state court also attached some importance to the fact that after the grain was delivered on the cars the plaintiff might have changed its mind and have sold the grain at the place of delivery or have shipped it to another point in Kentucky. No doubt this was possible, but it also was improbable."

Hughes Bros. Co. v. Minnesota, 272 U.S. 469 (1926), is of interest in this connection because the seller transported the property part of the distance and the buyer transported it for the remaining distance of the interstate journey. It appeared that the Minnesota seller contracted to sell timber to a Michigan buyer. The seller's headquarters were in Cook County, Minnesota through which flows the Swamp River, which empties into the Pigeon River, which empties into Lake Superior. Under the contract, seller was to deliver the timber into buyer's vessels at the mouth of the Pigeon River. The price was $12 per cord. $3 was payable on the basis of provisional measurements by buyer's inspector when the timber was cut and placed during January, February and March at river landings on or near the ice. Title to the wood on which such advances were made was to be in buyer. Another $3 was to be paid by buyer when the timber was

loaded by seller in buyer's booms at the Pigeon River mouth. The remaining $6 was to be paid after delivery at Muskegon, Michigan. Liability insurance was to be carried by seller. Cargo insurance was to be carried by buyer. The logs commenced to move when the ice broke on April 29 and by the latter part of July all timber had been shipped by buyer's vessels to Michigan. The logs were assessed to tax on May 1. The Court held, however, the timber was not taxable under the commerce clause. The Court stated:

> "*We do not think it important*, for purposes of this case, *to decide where title to the timber was at the time the drive began*. The Paper Company had an interest in the timber and so had the Timber Company.
>
> * * * * *
>
> "Had the Timber Company or someone claiming under it attempted to stop the drive after it had begun, and interfered with the passage of the timber down the Swamp or Pigeon River, it would have been a breach of the contract of sale.
>
> * * * * *
>
> "*Both parties intended interstate shipment, they had bound themselves to it, the logs were segregated and were moving in the contemplated journey which neither could prevent if they carried out their agreement.*
>
> * * * * *
>
> "*Solution is easy when the shipment has been delivered to a carrier for a destination in another State. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination*, as in the Champlain Company case.

The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. *The mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith* and temporary interruption of the passage is reasonable and in furtherance of the intended transportation; as in the Champlain case. Here the case is even stronger in that the owner and initiator of the journey could not by his contract divert the logs after they had started from Swamp River without a breach of contract made by him with his vendee, who, by the agreement of sale, divided with him the responsibility for the continuous interstate transportation." (Italics supplied).

See also: *The Pipe Line Cases*, 234 U.S. 548 (1914), where for regulatory purposes under the Hepburn Act, the transport of oil, purchased by Standard Oil Company, through its own pipe lines was held to constitute interstate commerce. The Court stated:

"That the transportation is commerce among the States we think clear. That conception cannot be made wholly dependant upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce."

Again, in *Rearick v. Pennsylvania*, 203 U.S. 507 (1906), the Court stated:

"Commerce among the several States" is a practical conception not drawn from the "witty diversities" (Yelv. 33) of the law of sales."

The Circuit Court of Appeals in *In Re Globe Varnish*, supra, stated:

> "In the instant case, we think it makes no difference when the title passed, and we are unable to perceive how that fact, whenever it occurred, could be determinative of the character of the sale, as to whether it was an interstate or intrastate transaction."

Michigan-Wisconsin Pipe Line Co., 347 U.S. 157 (1954), is likewise another case reaffirming the principle that Texas, as the state of exit, could not under the commerce clause tax the taking and purchasing of gas *transported by the purchaser* through its own pipe line for use and sale outside Texas.

In the old case of *Coe v. Errol*, 116 U.S. 517 (1886), involving the question when logs to be floated downstream to a point outside the state come under commerce clause protection, the Court stated:

> ". . . nor are they in process of exportation nor is exportation begun *until they are committed to a common carrier* for transportation out of the State to the State of their destination, *or have started on their ultimate passage to that State.*" (Italics supplied).

The foregoing cases clearly condemn the tax here sought to be imposed by petitioner. We respectfully suggest, under the established and proven facts heretofore set forth, that it would be impossible to find or even imagine a case where the certainty of the out-of-state destination could be plainer. The product involved, namely, cast iron pipe and related fittings, is sold to and hauled by the purchaser for the sole and only purpose of being buried under a

specific piece of out-of-state ground in a specific out-of-state sewage or waterworks job in the specific sizes and lengths called for by the engineering plans and specifications. All of the contractual documents are tied into the particular out-of-state job. The material is sold for a delivered price at the job site. Respondent pays in all cases the freight to the job site. In no cases were there any breaches of contract or attempts to divert the property to local intrastate use. The bulk of the sales have been taxed in the state of destination.

In short, the only possible basis of justifying the tax here is to hold that the constitutional protection of the commerce clause is now to be restricted to a particular mode of transportation, namely, truck or rail common carrier, a mode of transportation unknown in 1787 when the Constitution was adopted and the commerce clause framed.

The effect of petitioner's attempt to impose a second tax burden on these interstate sales is to make interstate commerce bear two taxes, while intra-state commerce is required to bear but one. This is the very type of discrimination the commerce was intended to preclude.

The sales were not locally consummated by the complete, free and unrestricted delivery to the purchaser's agent of the material in Utah. By its own findings petitioner recognized the pipe was purchased through respondent's out-of-state sales agents for use on out-of-state jobs. Nor can it be denied that the contracts required out-of-state delivery to the job site, that respondent out of the delivered price

paid the freight to out-of-state destination, that buyer's truck driver took possession under a standard domestic bill of lading to haul the material to the out-of-state job site at the regular established tariff rate. This is interstate commerce, the proceeds of which are constitutionally immune from tax in Utah, the state of the seller.

C.

Infringement Of The Constitution Cannot Be Justified On Grounds Of Administrative Convenience Or On Theoretical Difficulties Of Securing Proof Of Out-Of-State Destination In Other Types Or Classes Of Cases Not Before The Court.

Only somewhat partially expressed but deeply implicit in petitioner's entire argument, is an underlying premise or assumption that administrative chaos will result if commerce clause protection is not limited to common carrier transport. It is implied that if protection is extended to include private transport to out-of-state destination by the customer, the states will then be faced with the hopeless burden of 'extracting proof and evaluating claims that a purchaser intends to use the property purchased somewhere outside of the state or that he is obliged to do so.' (Petition, p. 8).

This is essentially an argument that the meat cleaver should be permitted where the scalpel is too much trouble. It is an argument that there is no need to separate the wheat when there is admittedly a great deal of chaff. It is an agrument that this petitioner is unable to enforce Constitutional rights at the administrative level. It is inherently an argument that state tax agencies are too busy to separate

the genuine from the counterfeit, the true from the false, in the area of interstate sales of goods for out-of-state use and consumption, except where out-of-state transport is accomplished by independent common carrier.

The answer, of course, to this entire premise lies in the distinction long adhered to by this Court. On the one hand is the completely locally consummated transaction in which the purchaser's *intended* use of the property is irrelevant. In this type of transaction, the evidentiary trace of an intent by the purchaser to thereafter transport the goods out of state following purchase is likewise irrelevant. On the other hand is the true interstate sale of merchandise for out-of-state use or consumption in which the contract for its performance requires a shipment or transport of the material out of the state. Here the leaving of evidentiary traces of the transaction may be crucial.

A bill of lading evidencing the interstate shipment by common carrier, even with rights in the buyer of stoppage in transitu, has long been held sufficient proof of the interstate character of the transaction. But if the goods move interstate by private transport, protection of the state's revenue system obviously requires a different and greater degree of proof. The proof then must be manifestly certain. The distinction, however, rests on the degree of proof, not on the means of transport. The particular means of transport is only pertinent in determining whether as an evidentiary matter the proof is beyond doubt. The question cannot be the mode of carriage, whether by truck, pipeline, rail, airplane, or boat, but the certainty of proof.

The Utah Court decided the present case on its own facts, not on the facts of some other case. The proof here obviously meets the test of manifest certainty.

Petitioner finds no 'difficulty of extracting proof' of out-of-state shipment in the case of sales of motor vehicles to non-residents under this same sales tax law. The law provides that sales of motor vehicles to non-residents are exempt where not used in the state 'except as necessary to transport them to the borders of this state'. Sec. 59-15-6, U.C.A. 1953. Upon the vehicle purchaser's *affidavit* that he is a non-resident and that the vehicle "will not be used on the highways of Utah, until licensed in the state of residence, except for such travel as is necessary to transport it directly to the border of this state," (together with the seller's affidavit that he believes the purchaser to be a non-resident), petitioner issues a 96 hour temporary in-transit permit which permits the purchaser to drive or tow the vehicle free of sales tax "from the place where the vehicle was purchased to its destination by a customary route." 1962 Motor Vehicle Regulation No. 5(d).

Nor does petitioner in administering the separate sales tax laws covering motor and special fuels find any grave administrative difficulties in permitting free of tax the out-of-state shipment of motor fuels by purchaser transport. For example, the motor fuels tax law states the tax shall not apply to "sales of motor fuels actually exported from this state. . . ." Sec. 41-11-20, U.C.A. 1953. Motor Fuels Tax Regulation No. 3 includes by way of proof in support of exemption, out-of-state customer deliveries where:

"3. Delivery is made at a point in the state of

Utah to a licensed distributor or importer of another state for use or sale in that state;

"4. Delivery is made in a drum or similar container, at a point in the state of Utah to a person for use in another state."

Form TC-112, entitled "Proof of Exportation—Motor Fuel," is required to be executed to substantiate the exemption. This form is an unsworn certificate showing date of export, number of gallons, the name of the "Purchaser or Consignee," "For Use Or Sale At" blank city or town and state, seller's invoice number, and is signed for the purchaser and the seller by (blank) under the following statement:

"I certify that the foregoing is true and correct, and that this motor fuel will be for use or sale in the state specified above."

A similar rule is followed in the case of the sales tax on cigarettes exported from the state to dealers in another state. Sec. 59-18-10, U.C.A. 1953. Cigarette Tax Regulation No. 8(c) provides:

"Exempt Sales — Records

"Any person making such out-of-state sales or sales claimed to be exempt will be required to keep a record in the following form:

(1) Date of sale;

(2) Name of person to whom sold;

(3) Address to which delivered;

(4) *Method of delivery (mail, express, R. R. freight, auto, freight, other);*

(5) Quantity of merchandise shipped;

(6) Whether or not stamps were affixed to merchandise and if so, the value of stamps so affixed."

(Italics supplied)

Also of interest in the present connection is the matter of the degree or quantum of proof required by petitioner in actual practice under the present general sales tax law, to support the exemption of sales for resale. Petitioner claims that only proof of a common carrier interstate shipment will suffice to support the exemption of interstate commerce. A sale for resale, regardless of where the resale takes place, however, is exempt under the law and regulations upon the purchaser's mere representation and certificate that he is purchasing the merchandise for resale. The exemption of sales for resale is not limited by the law to sales for resale within Utah. Any purchase for resale is exempt.

Any suggestion that a state should be permitted to levy a direct and discriminatory tax on the unapportioned gross receipts of all interstate sales, regardless of the certainty of proof of out-of-state shipment and use in a particular case, except where a common carrier is involved, lacks merit.

D.

The Granting Of Commerce Clause Protection To Shipments By Common Carrier Transport From The Seller's State And Denying Such Protection To Shipments By Private Truck Transport Where The Certainty Of Out-Of-State Destination Is Equally Plain, Is Irrational And Repugnant To The

Present-Day Transportation Needs Of The Nation.

This case directly involves the status under the commerce clause of the private truck. It indirectly involves all non-common carrier forms of interstate transport because of petitioner's basic position that only common carrier shipments from the state are entitled to commerce clause protection.

The denial of commerce clause protection to interstate transport of goods by customer truck, to out-of-state point of use and consumption, we here suggest is not only inherently irrational but also repugnant to the present-day transportation needs of the nation.

We deem unnecessary to fill this brief with elaborate statistical tables to prove an experienced fact. *The economy of the United State today rides primarily on the private truck.* To single out for tax interstate shipment of goods by private transport is to cut deeply into the public interest of the United States. The free market economy of this nation cannot survive without the private truck. To now limit the commerce clause to common carrier transport is to reject the wisdom of the past, the economic realities of the present, and the technological opportunities of the future. The greatness in the commerce clause decisions of this Court, it may be suggested, may lie in the simple fact that this Court has always struck down any attempt to rob this nation's future of its Constitutional birthright.

Although accompanied by various lamentations, the hard fact is that this generation has witnessed a revolution in the transportation system of the nation whose end is not

yet in sight. The nation and the nation's goods now ride at an ever-expanding rate on rubber-tired wheels. The nation is committed to a vastly improved interstate highway system. The whole pattern of urban and industrial development is changing. The country is no longer tied to dock or railhead. The motor truck and the passenger car are responsible.

The President of the United States, in his message to Congress on The Transportation System Of Our Nation, April 5, 1962,* stated:

> *"The basic objective of our Nation's transportation system must be to assure the availability of the fast, safe, and economical transportation services needed in a growing and changing economy to move people and goods, without waste or discrimination, in response to private and public demands at the lowest cost consistent with health, convenience, national security, and other broad public objectives.* Investment or capacity should be neither substantially above nor substantially below these requirements—for chronic excess capacity involves misuse of resources, and lack of adequate capacity jeopardizes progress. The resources devoted to provision of transportation service should be used in the most effective and efficient manner possible; and this, in turn, means that users of transport facilities should be provided with incentives to use whatever form of transportation which provides them with the service they desire at the lowest total cost, both public and private.
>
> *"This basic objective can and must be achieved*

* 87th Congress 2d Session, House of Representatives, Document No. 384.

primarily by continued reliance on unsubsidized privately owned facilities, operating under the incentives of private profit and the checks of competition to the maximum extent practicable. The role of public policy should be to provide a consistent and comprehensive framework of equal competitive opportunity that will achieve this objective at the lowest economic and social cost to the Nation.

"This means a more coordinated Federal policy and a less segmented approach. *It means equality of opportunity for all forms of transportation and their users and undue preference to none.* It means greater reliance on the forces of competition and less reliance on the restraints of regulation. And it means that, to the extent possible, the users of transportation services should bear the full costs of the services they use, whether those services are provided privately or publicly.

"*For some 75 years, common carriage was developed by the intention of Congress and the requirements of the public as the core of our transport system. This pattern of commerce is changing — the common carrier is declining in status and stature with the consequent growth of the private and exempt carrier.* To a large extent this change is attributable to the failure of Federal policies and regulation to adjust to the needs of the shipping and consuming public; to a large extent it is attributable to the fact that the burdens of regulation are handicapping the certified common carrier in his effort to meet his unregulated competition. Whatever the cause, the common carrier with his obligation to serve all shippers — large or small — on certain routes at known tariffs and without any discrimination performs an essential function that should not be extinguished." (Italics supplied).

Excerpts from the President's message to Congress relative to Our Federal Pay-As-You-Go Highway Program, February 28, 1961,* are as follows:

> "Our Federal pay-as-you-go highway program is in peril. It is a peril that justifies a special message because of the vital contribution this program makes to our security, our safety, and our economic growth.
>
> * * * * *
>
> ". . . By 1975 — and the Interstate System is required by Congress to have enough lanes to move safely all the vehicles expected in 1975 — there will be an estimated two or three times as many vehicles as use those roads today. Even though some expressways now seem excessively large, an emergency program then will be too late — we must continue to build those highways now at a steady rate sufficient to assure completion on schedule.
>
> "As early in the era of the automobile as 1916, Congress recognized the Federal responsibility in this area — to promote the national defense, interstate commerce, farm and resource development, and postal service. The pay-as-you-build 41,000-mile program initiated in 1956 was the most notable and farsighted recognition of this responsibility in history."

A rough statistical idea of the extent to which, as the President has stated, the common carrier has declined and the private carrier has increased, in status and stature in the transportation picture of the nation, is as follows.**

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* 87th Congress, 1st Session, House of Representatives, Document No. 96.

** The figures are from Motor Truck Facts, 1962 Edition, published by the Automobile Manufacturers Association.

In 1961, there were a total of 12,321,282 motor trucks registered in the United States representing 16.2 per cent of the total of all motor vehicles. 11,699,142 of the trucks were privately owned and 622,140 were publicly owned. Truck registrations have more than doubled since 1946 when the number was 5,986,081. In 1908 there were 1,000 privately owned trucks registered.

New truck registrations in 1961 amounted to 918,608. California led all states with 103,844 registrations. Factory sales of motor trucks and buses in 1961 totaled 1,133,304 units. 19 per cent of the trucks and bus production in 1961 was for export. 583,000 trucks and buses were scrapped in 1960.

The 1964 estimate of total motor vehicle registrations is 84,412,097, comprising 70,609,254 automobiles, 282,853 buses, and 13,519,990 trucks and combinations. Excluding publicly owned vehicles, there will be 11,690,934 private gasoline and 55,074 private diesel trucks and combinations, 1,026,897 for-hire gasoline and 98,022 for-hire diesel trucks and combinations.

In 1961, there were 30,611,839 trucks and bus registrations in the entire world of which 12,321,282 trucks and 280,686 buses, or 41.2 per cent of the total, were registered in the United States. This compares, for example, with 1,649,377 trucks and 39,465 buses in France, 1,539,000 trucks and 81,000 buses in the United Kingdom, and 3,300,000 trucks and 45,000 buses in the U.S.S.R.

Trucks haul 90 per cent of livestock arriving at major markets, 62 per cent of fruits and vegetables sold at thirty

seven leading markets, 37 per cent of refined petroleum products, 48 per cent of anthracite coal, 68 per cent of crushed stone and 88 per cent of sand and gravel. Trucks also haul 82 per cent of meat products, 82 per cent of footwear, 79 per cent of fabric mill products, 77 per cent of heating and plumbing equipment, 74 per cent of candy, 73 per cent of medicines, 70 per cent of household furniture, 70 per cent of office and store machines, 67 per cent of knitting mill products, 66 per cent of motor vehicles and equipment, 59 per cent of metal working machinery, 57 per cent of primary metals, 53 per cent of engines and turbines. The combined haul of crude petroleum and petroleum products carried by truck in 1940 was 5.7 per cent of the total. In 1960, this percentage had risen to 24.8 per cent.

In 1960, total vehicle mileage traveled by truck was 126,409 millions of miles.

In 1961, *common and contract intercity motor carriers* (not including intercity ton-miles of local carriers, local cartage or pick-up and delivery ton-miles, or ton-miles of carriers other than holders of ICC operating authorities) *hauled an estimated total of 101 billion ton-miles of freight out of a total of 305 billion ton-miles carried by both private and for-hire carriers.* The common carrier truck thus only hauled one-third the tonnage hauled by the private truck.

One out of every nine employed persons in the United States — 7,500,000 persons — depend on trucks for their livelihood. Special truck taxes paid in 1961 totaled $3,100,000,000 or one-third of the total paid by all motor vehicle users.

The regulated truck common carrier although con-

siderably behind the private truck and even further behind the railroad in ton-miles of freight carried, is nevertheless rapidly catching up with the railroads in revenues.* In 1961, the railroads received $7,858,000,000 for hauling freight, or about 47 per cent of the freight revenues received by all regulated freight carriers. The regulated motor carriers received $7,375,000,000, or about 44 per cent. The rest was accounted for by water carriers, pipelines and airlines. The trucking industry expects to pass the railroads in revenues within the next few years. The American Trucking Association estimates the value of total intercity truck business by both for-hire and private carriers at $14,200,000,000 for 1961.

The key role of the private truck in our expanding economy is not merely a matter of numbers of units or ton-miles carried. The private truck is an economic instrumentality working for the welfare of the industry to which it is an incident. It has achieved its dominant position because it improves service and lessens the cost to consumers of the products of an industry. The inability of industry to use the private truck would be a tremendous economic loss to the nation.

> "In the intangible sense, the private truck may well be considered a symbol of the freedom of enterprise. It is visual evidence that shippers, for reasons of their own, whatever those reasons might be, have elected to haul their own goods in their own vehicles; that in so doing they have exercised their inherent right

* The figures are from article by John M. Lee, New York Times, Sunday, August 5, 1962.

of freedom of choice as to the form of transportation used."*

The true picture of the vital role of the private truck in the nation's economy cannot be presented at the present time with any degree of statistical exactitude. The statistics are simply not available. **It is clear, however, as indicated in the President's message to Congress, that the transportation policy of the United States is now primarily anchored to the private carrier, even though, at the same time, the common carrier will continue to perform "an essential function that should not be extinguished."

In its historical context, it seems clear that interstate commerce cannot, without affront to reason, be limited to common carrier or any particular mode of transport. The commerce clause protects not a mode of transport but 'commerce among the several states.' Nor can it make any difference, on the reason of the thing, if a transaction is truly in fact interstate commerce, whether the subject of commerce is pushed by the seller, pulled by the buyer or hauled by a third person to market across the state line. A brief reference to the growth of transportation in the early days of the nation is pertinent here.

The Encyclopaedia Britannica, 1946, Vol. 12, in article entitled "Interstate Commerce," p. 538, states:

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* "The Private Truck Is Needed In Our Economy," By J. W. Sinclair; Highway Highlights, April, 1956.

** The Salt Lake Tribune, November 19, 1962, in an Associated Press release indicated The Census Bureau has now been given a $175,000 appropriation, which took 14 years to clear Congress, to begin a two-million dollar transportation census in 1963, the first census of transportation in the nation's history.

"Freedom of Inter-State Commerce in the United States.—The commerce passing State boundaries in the United States has become of great volume. No State imposes trade restrictions. The United States throughout its wide territory is a single commercial unit with full freedom of internal trade. In this regard the United States is in marked contrast with Europe, where racial and historical causes have brought about the existence of many nations each concerned with safeguarding its own internal trade against the undue encroachment of the commerce of other countries.

Freedom of inter-state commerce has been as great an aid to political success as to economic welfare. The commerce clause of the Constitution made a united country possible; in spite of sectional divergencies and a civil war, the nation has been held together and the States have grown into an indissoluble union because industry, trade, transport and communications have known nothing of State boundaries or of political differences."

Attention is invited to the issue of Fortune Magazine, August 1961, page 123, being Part IV of A History of American Business. Part IV deals with the development of the different means of transportation from the beginning of the Republic to more recent times. This article may be briefly summarized as follows:

In the time around 1787 the small new nation was a wilderness. The mystery is that people were able to go places without any way of getting there. After the turn of the 19th century, Eli Whitney brought in a new world of manufacturing but mass manufacture was a commercial impossibility without access to market. A product had to be

literally floated downstream or walked over Indian trails to market.

First came the toll roads, then the canals, then the rise of the river and lake steamers, and then the railroads.

The first toll road or turnpike was from Philadelphia to Lancaster under a Pennsylvania private charter of 1792. This touched off a turnpike fever which raged for 35 years. The Cumberland Road, projected by Congress in Jefferson's administration finally reached Wheeling on the Ohio "three Presidents, ten Congresses and fourteen congressional acts after its beginning."

Next came the canals, the first being short-haul waterways. The idea which became the Erie Canal went through many vicissitudes, but with the conclusion of the War of 1812, "De Witt Clinton's ditch" was approved by the New York legislature to be financed by state bonds. The digging was done with hand shovels and completed in 1825. The canal cut freight rates, shortened the time of haul, boomed land values, created new manufacturing cities from Utica to Buffalo, and created modern New York City. Other canals were built in Pennsylvania, Ohio and vital links established between the tidal rivers of the East and the surging new West.

Next came the steamboat, Fulton's Clermont having had its first successful voyage on the Hudson in 1807. Fulton went in partnership with Chancellor Livingston of New York who having envisioned the steamboat's future had obtained a monopoly for operating them in New York waters. Colonel John Stevens, launching a twin-screw pro-

peller ship, attempted to compete with Fulton and Livingston but was forced into other waters to ply between Philadelphia and Trenton, the New York-New Jersey franchise being sold to Aaron Ogden by Fulton and Livingston. However, Thomas Gibbons, a partner of Ogden, who had turned against his partner did set up his own competing service. A young man by the name of Cornelius Vanderbilt, with considerable ingenuity, skippered and kept Gibbons' vessel operating while Gibbons, with his counsel Daniel Webster, fought the first historic commerce clause case to the Supreme Court. In 1824, Chief Justice Marshall speaking for the Court held the Livingston monopoly illegal under the commerce clause. This freed the rivers of America to all men.

On the Ohio, Mississippi and the Great Lakes, the steamer created a new civilization. The 1850's were the peak years in western waters but the steamer was doomed by the 'iron horse.'

The railroad grew out of various confused beginnings, George Stephenson having demonstrated his "Locomotion No. 1" in England in 1825. The Baltimore & Ohio broke ground in 1828 for horse or sail operation. However, Peter Cooper constructed in the B. & O.'s shops the 'Tom Thumb' engine and the railroad age commenced. Its success rested on the flange wheel, Colonel Stevens' use of the 'T' rail and his son's discovery, in the winter during construction of a line across New Jersey, of the method of spiking the 'T' rails directly to wooden crossties. By 1840 there were more than 300 railway companies with a track mileage of 3,330 miles. Gauges were not uniform, brakes were still operated man-

ually and George Pullman had not yet devised his sleeping-car. After 1847, the railroad made Chicago the capital of the West.

From this time forward the course of transportation history is well known. Federal regulation of the railroads commenced with the Interstate Commerce Act of 1887. Improvements in roads, the internal combustion engine and the diesel engine have given rise to the modern truck carrier type of transport which recently also came under Federal regulation. Regulation of air transport commenced in 1926 and more especially by the Civil Aeronautics Act of 1938.

The Encyclopaedia Britannica, Vol. 12, p. 540, states:

> "The U. S. domestic commerce, most of which is inter-state, is changing constantly with the evolution of industry and industrial processes, with the shifting of the major centers of production of the leading staples of manufacture, and with improvements in transport agencies and in methods of transport. Moreover, while commerce is increasing in volume, large-scale organization of business is more and more taking the place of small enterprises."

Just as in older times the Indian trail gave way to the turnpike, the turnpike to the canal and steamer, the canal and steamer to the railroad, so in recent times does the railroad appear to be giving ground to the truck and airplane. In 1787, interstate commerce could only be viewed not as a particular mode of transportation, especially one unborn, but as a physical movement of goods across state lines in need of Federal protection. Common carrier type of transport arose with the rise of mass manufacturing and involved capital outlay neither buyer nor seller could begin

to finance. Transportation to market to a large extent thus devolved upon the independent carrier.

Recent years have seen, however, a decline in the status of the independent carrier. Faced with rising costs and keen competition, large industrial and merchandising firms purchasing and selling goods in large volume have taken over their own transport from the truck and rail common carrier. This trend will undoubtedly continue and private transport by seller and by buyer across state lines will continue to grow.

Whether the interstate transport of goods in fulfillment of an interstate sale from the state of the seller to the point of consumption in the state of the buyer, takes place by way of truck, or by pipeline, or by rail, or by boat, or by air, or by floating downstream, or otherwise, whether the particular carrier be private or common, whether the responsibility of the transport be that of the seller or of the buyer, are all irrelevant. So long as the interstate character of the transaction in truth and substance is clear, the means of shipment is unimportant. To glue the Constitutional freedom of interstate commerce to any particular mode or form of transport would be irrational and offensive to the public interest.

E.

The Sales Here Involved Were Interstate And Not Local Sales, And The Superior Oil, Wood Preserving Corporation, And International Harvester Company Cases, Relied On By Petitioner, Are Inapplicable To The Case At Bar.

From the beginning, petitioner has persisted in the attempt to convert the special facts of this case into the ordinary case of a fully consummated local sale where the purchaser, resident or non-resident, then or thereafter, with or without knowledge of the seller, merely *intends* to take the property to some other state. This, however, is not an intention case. It is a case of the interstate sale of pipe into out-of-state sewage and waterworks jobs.

Petitioner's argument rests essentially on the contention that the decision below is in conflict with *Superior Oil Co. v. Mississippi*, 280 U.S. 390 (1930), *Dept. of Treasury of Indiana v. Wood Preserving Corp.*, 313 U.S. 62 (1941), and *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340 (1944). These cases, however, are unlike the case at bar.

In the Superior Oil case, oil and gasolene were sold and delivered to fish packers at wharves in Biloxi, Mississippi. The subsequent transport by packer's boat "to the neighborhood of Grants Pass, Louisiana," for resale to shrimp fishermen, was under a fictitious bill of lading without any use or purpose other than to give a color of interstate commerce to a clearly domestic transaction. "The seller of course paid no freight." "There was no consignee at the point of destination." "There was no point of destination for delivering the oil but merely a neighborhood. . ." The "gasolene was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes." "The only purpose of the vendor . . . was to escape taxation." Two sales were involved, one to the packers and

another by the packers to the fishermen.

In the case at bar, the sale and delivery of pipe to the out-of-state job site was not under a fictitious bill of lading. It was not delivered to a 'neighborhood' but to a specific trench site for burial at a specific location on a specific sewage or waterworks job. It was not for a sale for some later resale but a sale to a contractor for a specific final use and consumption on a specific job. The seller paid the freight by crediting the established tariff rate against the delivered purchase price. There was a specific consignee at a specific point of destination. The pipe was not in the hands of the purchaser to do with as it liked but to deliver it to a specific job site where it would later be paid for out of the proceeds of a particular job. Finally, as the Utah Supreme Court stated, the documents of sale and transportation here were not "an evasive gesture to avoid taxation."

In the *Wood Preserving* case, the wood ties were sold and delivered to the railroad in a transaction fully consummated in Indiana and for a price delivered in Indiana. The subsequent shipment by the railroad of the ties outside the state for creosoting treatment by the seller's subsidiary, a separate company, was a separate transaction under a separate and distinct contract. The seller paid no freight and showing its name as consignee was of no consequence in view of the completed delivery in Indiana.

The ties were not sold and delivered to the railroad at a delivered price, including freight, to and for burial at some specifically described out-of-state job site on the rail-

road's line of track outside the State of Indiana. The sales were made on the railroad's open credit and were not to be paid for out of the proceeds of a particular job at a specific out-of-state job site. The railroad when the ties were delivered in Indiana, was free to do with the ties as it saw fit. It could have stored or creosoted or otherwise used or disposed of the ties locally.*

Likewise, in the *International Harvester* case, the Class D sales, as stipulated by the parties, involved sales by an Indiana seller of Indiana goods to an out-of-state buyer who came to Indiana, took delivery there and transported the goods to another State. The sale and delivery were fully consummated locally. There was nothing in the transaction which required either seller or buyer to transport the vehicles and implements outside the state. There was nothing in the contract which prevented the customer, whether dealer or retail purchaser, from using, storing or reselling the goods in Indiana. The sales were not at delivered prices, including freight, for delivery and use at specific out-of-state job sites. A purchaser's intention to transport the goods out-

* The petition in the Wood Preserving case for a writ of certiorari filed by the Indiana tax authorities, states (p. 43):

"The case is wholly unlike the case where the ultimate destination of the product as the goods of the buyer required delivery to the buyer across state lines. Here the delivery to the Railroad Company had been completed in Indiana, and the only shipment across state lines was for the purpose of having a service applied to the products already fully owned by the Railroad Company; and even that shipment was wholly under the control of the Railroad Company. There was no requirement created either by the contract, the character of the goods purchased, or the character of the purchaser that the ties be transported."

side Indiana (if he had such an intention) was of no concern to the seller and had no connection with the contract. A purchaser if he in fact transported the goods to his out-of-state place of business may have saved some freight but he was not *paid* freight by the seller, either in cash or by credit, to haul specific goods to a specific out-of-state destination. The *International Harvester* case is thus a pure 'intention' case.*

The interstate transportation of pipe here involved being incidental to and in furtherance of the primary construction business of the contractor-customers of respondent, constitutes private carriage under the Federal law applicable to motor carriers, whether or not the contractor happens to make a profit from the transportation activity and whether title passes to the contractor f.o.b. point of origin or point of destination. See: *Williams Bros. Corp. Cont.*

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* This is abundantly clear even in the Harvester Company's brief filed in this Court opposing appellees' motion to dismiss appeal or affirm decision of State court, which states (pp. 7-8):

"It is true that in the class D sales the buyer would have complete control of the article in Indiana, but it is absurd to think there was any practical possibility that he would do anything with it but take it back to his own home town, which he did do. If the buyer were a dealer he *intended* to take it to his place of business. If the buyer were a user he *intended* to take it to his home. He had no other place of business and he had no other home." (Italics supplied).

Appellees' reply in their statement of matters and grounds making against the jurisdiction of this Court, etc., (p. 10) was as follows:

"That the buyer intended to transport the goods purchased into another State; that the buyer intended to resell them or that the buyer had any particular intent, is therefore, wholly immaterial."

Car. App., 44 Motor Carrier Cases (ICC) 557 (Div. 5) (1945).

In *Brooks Transp. Co., Inc. v. United States*, 93 Fed. Sup. 547 (1950) (E.D. Va.), affirmed 340 U.S. 925, (also affirming *Lenoir Chair Co. Cont. Car. App.*, 51 MCC 65), the opinion of the lower Court (per Dobie, J.) states:

> "The Commission, in declaring that Lenoir and Schenley were private carriers, as opposed to contract carriers or common carriers, applied what is known as *the primary business test*. In other words, if it is established that the primary business of a concern is the manufacture or sale of goods which the owner transports in furtherance of that business and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or is added thereto as a separate item."
>
> * * * * * * *
>
> "The history of the Act, we think, completely demolishes the validity of plaintiff's *compensation* criterion and supports the Commission's criterion of primary business purpose."

The Utah Public Service Commission, not petitioner, has charge of administrating the motor vehicle transportation laws of the state and has never at any time asserted any jurisdiction to regulate or prohibit the private interstate carriage of pipe to out-of-state job sites by the non-resident (or resident) contractor-customers of respondent. Nor is there anything in the record to suggest that these contractor-customers violated in any way the safety and gross weight

provisions of the Utah Motor laws, or were interferred with in any way, either on entering or leaving the state, at the port of entry truck stations operated by the Utah Highway Patrol.

Petitioner under its Point C. does not and cannot defend the injustice and the serious competitive injury to respondent's vital interstate business of two taxes on the same interstate sale, one in the state of the buyer and now one claimed by Utah, the state of the seller. It appears to be quite immaterial here whether the tax in the state of entrance on the interstate sales receipts here involved be designated a "sales" or a "use" tax. The practical economic effect is the same. The interstate sales receipts are taxed twice, intrastate sales receipts once. None of the states in which the plants of respondent's competitors are located, whether California, Iowa, Alabama, or otherwise, attempt to tax the type of interstate customer truck shipments here involved. Most of the bids on pipe jobs involve price spreads of less than the 2 per cent Utah tax here in question. This Utah rate is now 3 per cent with the recent increase of one-half per cent State and one-half per cent County tax.

The trend throughout the country is toward an increase in sales and use tax rates. A 3 per cent Utah and a 2 per cent Colorado tax makes a combined burden of 5 per cent on the gross receipts of each sale of pipe. Competitively this puts respondent with its back to the wall. It not only has to compete with cast iron pipe but with the cheaper and less durable forms of pipe which now flood the market such as concrete, steel, and plastic pipe. The growth in urban population and the need of increased sewage and waterworks systems to handle the new housing sub-divisions

and growing suburban areas in the West, puts a heavy financial strain on municipal water departments.

Southern California is one of respondent's vital market areas where it competes chiefly with the U. S. Pipe and Foundry plant located in Northern California. The California tax is now in most counties about 4 per cent. A combined Utah and California tax would thus be 7 per cent of the gross receipts of respondent's California sales by customer truck (although there happened to be no customer truck shipments to California during this period) but only 4 per cent on U. S. Pipe's sales.

Respondent's buyers are accustomed to paying the sales or use tax of the buyer's state. They will not as a practical matter accept another billing for Utah tax and, in view of the *Adams Mfg. Co.*, case, there would be obvious difficulties in maintaining suit in courts of the state of the buyer to enforce collection of the Utah tax. At the same time, it is illegal under the Utah sales tax law for respondent to absorb the tax.

Respondent billed its Colorado customers for "Colorado tax" without specification and remitted such amounts to the Colorado Department of Revenue with its sales and use tax returns. Petitioner's suggestion that respondent erred in "volunteering" this tax to Colorado under *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, has no merit. Petitioner itself found that all of these sales were negotiated by respondent's out-of-state sales agents. Respondent is qualified to do business in Colorado and is in essentially no different position than the *Berwind-White Coal Mining Company* was in New York State.

Respondent's plant would close up overnight if it were limited to the Utah market for pipe. It lives on its interstate business. The matter of the extension of respondent's responsibility as vendor to collect and remit sales and use taxes on all interstate sales is presently under review. The company has regularly assumed this responsibility in the states comprising its major marketing areas. During the period here involved, however, the tax payments to Arizona, New Mexico and Wyoming were handled by the non-resident buyers. The contractors involved in this type of work are normally subjected to periodic, if not in all cases specific job tax audits. Also, the jobs are not generally closed out and the retainages released by the governmental agencies to the contractors until all claims against the job have been paid. In these circumstances, the tax collection problem has not been a critical one in the states of use of the material.

Petitioner's reference to the provision in the use tax laws of a few states (including Arizona and New Mexico) exempting property where a sales or use tax has been previously levied on the property by another state, may be disposed of briefly. The National Association of Tax Administrators, the official organization of the tax and revenue departments of the several states, in its testimony on Sales and Use taxes before the Special Subcommittee on State Taxation Of Interstate Commerce,* stated:

"In the typical interstate transaction the vendor

* Hearings Before The Special Subcommittee on State Taxation Of Interstate Commerce Of The Committee On The Judiciary, House Of Representatives, 87th Congress, 2nd Session, Serial No. 20A — Sales and Use Taxes.

who ships goods to a purchaser in another state incurs no sales tax liability in the State of origin even though the sale is completed and payment is made there. Under the decisions of the U.S. Supreme Court the purchaser is protected from the possibility of multiple levies on genuine interstate sales and shipments. The legal immunity which the Court has prescribed by its interpretation of the commerce clause is thus in full accord with the economic principle that taxes on consumption should be levied only by the jurisdiction where the consumption occurs." (P. 144).

Also,

"In some jurisdictions, the taxpayer is permitted to offset his use tax liability to the extent of the amount of the sales tax he has paid in another State. This is a matter of grace, in effect a waiver by the State which really has the primary claim for the tax on goods purchased for use in that State." (P. 145).

This Court in the *Henneford* case, supra, also indicated that the right of a State to levy a use tax was not dependent upon the granting of any credit for sales taxes previously paid to another state.

By general acceptance, the sales taxes imposed by the some 34 states and numerous odd city and local governments in addition thereto, are taxes not on the seller but on the consumer. The state of market and consumption and not the state of manufacture and origin gets the tax. These credit provisions even in the states which do have them have never been interpreted to shift the primary claim of the state of market back to the state of manufacture. Such interpretation would destroy the whole philosophy and the legal and economic basis on which the taxes

were initially enacted during the 30's and upheld by this Court. They merely protect property purchased and used and taxed in one state from being again taxed on subsequent removal and use by the owner in another state. They do not as a free gift from the states of market confer back on the state of manufacture the Constitutional right to tax the proceeds of an interstate sale. This precise point was involved, for example, in the *Whitmore Oxygen* case, supra, in which the Utah Supreme Court refused to grant a credit to the Utah purchaser against Utah use tax for any tax payable to Indiana, the state of the seller, for the simple reason that under the *Adams Mfg. Co.* decision of this Court no tax was properly payable to Indiana.

This same reasoning applies to the sales here. Neither Colorado, California, Wyoming, Arizona, nor any other state, with or without such a credit provision in their use tax law, is going to permit for one minute this respondent to select which state gets the tax or recognize Utah's right, as the state of the seller, to tax the proceeds of interstate sales and the consumers of cast iron pipe within their respective jurisdictions.

II.

The Tax Here Sought To Be Levied Would Deprive Respondent Of Property Without Due Process Of Law In Violation Of Section 1 Of The Fourteenth Amendment Of The Federal Constitution.

Many of the cases raising commerce clause objections to a tax also raise the due process objection. The two questions are somewhat intimately inter-related. The primary

concern under the due process clause, however, is not the burden on the interstate commerce transaction but the extra-territorial application of the tax.

Petitioner itself found that most of the sales were negotiated by respondent's out-of-state sales agencies. There appears to be, therefore, really no answer to the contention that the present tax is void because by taxing the entire, full, 100 per cent of the gross receipts or income from an interstate transaction which occurs both within and without the State, there is a violation of the due process clause.

The customers in almost all of the transactions were out-of-state construction firms and the material purchased was paid for out of the proceeds of the out-of-state jobs. Solicitation and negotiation of the contracts and collection activity of the accounts are of necessity outside the state. The sales transaction is thus in fact rooted in two states. Yet Utah here proposes to tax respondent on the full gross income of the sales without apportioning such income within the State on some fair allocation formula. This it cannot do.

A state cannot tax income from activities or income earned outside the state. An apportionment formula must be used by the state which fairly allocates the income to business done within the taxing state. Here, without any apportionment whatsoever, Utah has allocated one hundred per cent of the gross income from the interstate sales transactions to Utah. This is error. For example, see:

Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920);

Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission, 266 U.S. 271 (1924);

Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931);

Butler Brothers v. McColgan, 315 U.S. 501 (1942).

III.

The Tax Here Sought To Be Levied Would Deny To Respondent The Equal Protection Of The Laws In Violation Of Section I Of The Fourteenth Amendment Of The Federal Constitution.

The equal protection clause relating as it does to discrimination strikes down any tax where the subject matter taxed rests on no rational or reasonable basis of classification. This is the case here.

The same material going down the same road to the same out-of-state job site under the same contractual documents is non-taxable if by respondent's trucks, non-taxable if by truck common carrier but taxable if by customer truck. There is here no reason which justifies any distinction between these classes of delivery employed by respondent to effect the interstate haul.

Further, with with respect to automobiles Sec. 59-15-6 specifically exempts:

". . . all sales of vehicles of a type required to be

registered under the provisions of the motor vehicle laws of this state which are made to bona fide non-residents of this state and are not thereafter registered or used in this state except as necessary to transport them to the borders of this state; . . .

In other words, according to petitioner's position, it is taxable interstate commerce if the Warner Bros. firm hauls purchased cast iron pipe to a job at Littleton, Colorado, from Provo, but non-taxable interstate commerce if they drive or tow a purchased truck. Or, if Warner Bros. purchases a truck in Provo to transport the pipe to Littleton, according to petitioner, the truck goes tax-free but the pipe cargo is taxable.

The classificaton here proposed by defendant as a basis for tax is so completely unreasonable and discriminatory as to be unconstitutional under the equal protection of the laws clause of the Federal Constitution. The rank discrimination here is not between the types of property being taxed but between the means of transport utilized to effect the interstate delivery of the goods, not only under this sales tax law but under the other sales tax laws administered by petitioner as mentioned heretofore.

See:

Adams v. Mississippi Lumber Co., 84 Miss. 23, 36 So. 68, (1904);

Quaker City Cab Company v. Pennsylvania, 277 U.S. 389 (1928);

Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926);

Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949).

IV.

The Tax Here Sought To Be Levied Is Invalid Under The Provisions Of The Utah Sales Tax Law And The Sales Tax Regulations Issued Thereunder.

The Utah sales tax law exempts from tax "sales which the state of Utah is prohibited from taxing under the Constitution or laws of the United States." (Sec. 59-15-6, U.C.A. 1953). The sales tax regulations defining interstate commerce provide that to constitute interstate commerce:

> "1. The transaction must involve actual and physical movement of the property sold across the state line.
>
> "2. Such movement must be an essential and not an incidental part of the sale.
>
> "3. The seller must be obligated by the express or unavoidable implied terms of the sale or contract to sell to make physical delivery of the property which forms the subject matter of the transaction across a state boundary line to the buyer."

It is, of course, clear from the facts outlined in the opinion of the Utah Supreme Court that all three of the above definitional tests are met. All of the goods moved across the state line as an essential part of the sale under contracts legally obligating the seller to make delivery to the out-of-state job sites. The transactions are, therefore, exempt from tax by reason of the Utah State Tax Commission regulations, duly issued under the statute and having the

full force and effect of state law. The question of the existence of an adequate state ground to support the decision of the Utah Supreme Court is therefore debatable.

CONCLUSION.

The Constitutional importance of the present case in its commerce clause aspect centers chiefly around the future status and stature to be accorded the private truck as an instrumentality in the conduct of commerce among the several states of the United States. A large and ever-increasing share of this commerce is now being borne by private truck transport. Some of the largest truck fleets in the nation are now under private operation. As the private truck moves over the nation's highways, crossing and re-crossing state boundary lines, and hauling the nation's goods to market or use, it leaves the same evidentiary track of its movement as the truck common carrier. The free-trade market economy of the United States needs the private truck. The private truck needs the protection of the commerce clause of the Federal Constitution. Such protection is required under the decisions of this Court.

Among all the decisions down through the years of this Court, none out-ranks in historic greatness the pre-war sales and use tax decisions. The true and full significance of those decisions in preserving our Federal system in a time of crisis is only now becoming apparent. The freedom of interstate commerce was maintained inviolate, but, at the same time, the States were permitted to breathe and live again. The Court succeeded in establishing a true harmony

between economic realities and the Constitutional necessities of a Federal-State system. In practical truth, the decisions represented a break-through which permitted the States to do that which in proposed legislation, the Congress had failed to approve.

> "Mr. Conlon. The bill as proposed back in 1934 and as passed by the Senate was practically — I say this in a pragmatic sense now — accepted by the Supreme Court decision in *Berwind-White* and related cases in 1940. One might say that the Supreme Court decided that case as though that 1934 proposed legislation was on the books." (P. 141, Subcommittee Hearings, supra; also, See p. 135).

Other testimony of the National Association of Tax Administrators showing the general fiscal importance of sales and use taxes to the States grounded on the decisions of this Court, is as follows:

> "In 1932 the sales tax was practically unknown. In 1950 at the State level it counted for roughly 21 percent of all State tax revenue. And in 1961 it accounts for about 24 percent of all State tax revenue.
>
> "Now, if you exclude motor fuel taxes which by and large are earmarked solely for highway purposes, you will find that the sales and use tax now accounts for about 30 percent of all revenue available for general State governmental purposes, and the outlook is that its relative importance in the State fiscal picture is going to increase.
>
> "Another little item of comparison, in 1961 the State sales and use taxes accounted for about twice as much as the yield of State personal income taxes, and

about four times as much as State corporation taxes.

"Now, in addition to about $5 billion in State sales and use tax revenue, there is approximately $1 billion more collected from generally imposed sales and use taxes at the local level of government. So that in the aggregate we are talking about a tax revenue that at the present time yields to State and local government about $6 billion annually.

"I think it might put the picture in a little better perspective if you compare the growth in State expenditures and the growth in State and local expenditures (just in the last decade) with the growth in Federal expenditures for all purposes except national defense and international relations. Now, roughly from 1950 to 1960, if you exclude expenditure for national defense and international relations, the Federal budget increased about $9.3 billion. . . .

"It is rather remarkable that State budgets themselves increased $9.9 billion in that same period, and if you take State and local government together, the increase from 1950 to 1960 amounted to $29 billion. So taking State and local governments together, their budgetary expenditures for general government purposes increased $29 billion in 10 years, whereas the Federal budget increased only $9 billion in that same time if you exclude expenditures for national defense and international relations and limit yourself to what might be called the general cost of the general functions of government." (P. 131-2, Subcommittee Hearings, supra).

All of this has been accomplished under the sanction of this Court and on the basis that the state of market and not of manufacture is the one entitled to the tax.

We ask the Court to affirm the decision of the Utah Supreme Court which, in accord with the decisions of this Court, condemns imposition of a sales tax directly on the unapportioned gross receipts of interstate sales by the state of the seller.

Respectfully submitted,

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